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No. 90-___

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Alabama has legitimate reasons to treat hazardous waste from some 22 states (which have no hazardous waste treatment or disposal facilities, or efforts underway to develop same) differently from those states with such facilities. [See *Maine v. Taylor,* 477 U.S. 131, 152 (1986)].

2. Whether the Commerce Clause elevates the free flow of interstate hazardous waste above Alabama's right to enact reasonable and conditional restrictions on interstate hazardous waste to protect the health and safety of its citizens and the integrity of its environment.

3. Whether the Court of Appeals erred in holding that the decision in *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978) dealing with nondangerous solid waste (i.e., garbage) controls this case dealing with dangerous hazardous waste.

4. Whether hazardous waste (consisting of over one hundred different flammable, corrosive, poisonous or cancer-causing chemicals of a type that can blind, cripple, kill, defoliate the environment, contaminate drinking water supplies, and enter the food chain) is an object of commerce entitled to full protection under the Commerce Clause.

STATEMENT OF INTERESTED PARTIES

All parties to this case in the court below are listed in the caption.

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v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Alabama Department of Environmental Management (ADEM); Leigh Pegues, Director of ADEM; and Guy Hunt, Governor of the State of Alabama, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit invalidating an Alabama statute, Ala. Code § 22-30-11(b) (Supp. 1989), known as the "Holley Bill." The Holley Bill places conditional restrictions on the permanent burial of hazardous waste in Alabama from some 22 states which have no hazardous waste treatment or disposal facilities, or efforts under way to develop same. The Court of Appeals held the statute is violative of the Commerce Clause of the Constitution.

OPINIONS AND ORDERS BELOW

The August 8, 1990 opinion of the United States Court of Appeals for the Eleventh Circuit reversing a summary judgment in favor of Petitioners is reported at 910 F.2d 713 and reproduced in App. A, *infra*, A-1. That court's opinion denying the application for rehearing and modifying the opinion is reported at 924 F.2d 1001 and reproduced in App. B, *infra*, A-23. The District Court's order granting Petitioners a summary judgment and memorandum opinion are reported at 729 F. Supp. 792 and are reproduced in App. C, *infra*, A-30.

JURISDICTION

The Eleventh Circuit issued its opinion on August 8, 1990, and denied Petitioner's application for rehearing on February 7, 1991. This petition is being filed within 90 days of the denial of rehearing. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, § 8, cl. 3 of the United States Constitution provides: "The congress shall have power . . . To regulate commerce . . . among the several states . . . . "

2. The Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 9604(c)(9), provides:

> (9) Siting
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> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which —

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,
(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
(C) are acceptable to the President, and
(D) are in compliance with the requirements of Subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.]

3. The Holley Bill, Ala. Code § 22-30-11(b) (Supp. 1989) (Ala. Acts 1989, No. 89-788) provides in pertinent part as follows (the full text of the act appears in App. D, *infra*, A-57):

(b) It is unlawful for any person who owns or operates a commercial hazardous waste treatment or disposal facility within this state to dispose or treat any hazardous wastes generated in any state outside the State of Alabama which:

(i) Prohibits by law or regulation the treatment or disposal of hazardous wastes within that state and which has no facility permitted or existing within the state for the treatment or disposal of hazardous wastes; or

(ii) Has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; unless that state has entered into an interstate or regional agreement for the safe disposal of hazardous wastes pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act. The department shall establish and maintain a list of states from which hazardous wastes cannot be ac-

cepted for treatment or disposal pursuant to this paragraph and there shall be no liability under the paragraph for disposal of wastes from a state until 15 days after a state has been listed by the department. Such list shall be publicly available and set forth the reasons why each state is listed. The date on which a state is included on such list shall be provided. The list of states shall be revised monthly. The state of generation as shown on the hazardous waste manifest shall be used in determining whether a person has treated or disposed of waste in violation of this subsection, and any person who alters the state of generation on any manifest or misrepresents the state of generation of any hazardous waste for the purpose of circumventing this statute shall be punishable in accordance with section 22-30-19 herein.

(c) Subsequent to the effective date of Acts 1989, No. 89-788, no commercial hazardous waste treatment or disposal facility operating in this state may contract with states other than the State of Alabama in order to satisfy the capacity assurance programs required by 42 U.S.C. § 9604(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended.

(d) For the purpose of this section, the following additional terms are defined:

(1) AGREEMENT. Any interstate or regional contract or agreement made pursuant to capacity assurance requirements of Section 42 U.S.C. § 9604(c)(9) of CERCLA and which one of the signatories to such contract or agreement is the State of Alabama.

STATEMENT OF THE CASE

On October 4, 1989, the National Solid Waste Management Association and Chemical Waste Management, Inc. ("ChemWaste"), a trade association and the owner and operator of the largest hazardous waste disposal facility in the United States located at Emelle, Alabama, respectively, filed suit in the United States District Court for the Northern District of Alabama against the Alabama Department of Environmental Management (ADEM); Leigh Pegues, Director of ADEM; and Guy Hunt, Governor of the State of Alabama. The suit sought declaratory and injunctive relief challenging the constitutionality of Ala. Code § 22-30-11(b), known as the "Holley Bill". App. A, at A-2, 910 F.2d 715.[1]

ChemWaste challenged the constitutionality of the statute under the Commerce Clause. The District Court held the statute is constitutional and entered a final summary judgment in favor of Petitioners. App. C, at A-55, 729 F. Supp. at 805.

The Court of Appeals reversed, holding the Holley Bill violates the Commerce Clause. App. A, at A-22, 910 F.2d at 725. Petitioners timely filed a Suggestion for Rehearing In Banc and Petition for Rehearing Before the Original Panel. On February 7, 1991, the Eleventh Circuit panel denied the petition for rehearing and modified part II-C of the original opinion.[2] App. B, at A-29, 924 F.2d 1004.[3]

A. Statement of the Facts.

Before the Holley Bill became effective on September 14, 1989, ChemWaste accepted hazardous waste for treatment and permanent burial at Emelle, Alabama from 48 states. Eighty-five percent of the hazardous waste buried at Emelle was generated outside Alabama. App. A, at A-2, 910 F.2d at 715. The

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[1]The ChemWaste attack on ADEM's pretreatment and preapproval regulations is not an aspect of this petition.

[2]The modification is not pertinent to this petition.

[3]The Suggestion for Rehearing In Banc was denied on April 15, 1991.

District Court found that the quantities of hazardous waste buried at Emelle had increased substantially in recent years: from less than 200 million pounds in 1978 to 682 million pounds in 1985. After 1985 the levels continued to rise to 912 million pounds in 1986, 1.13 **billion** pounds in 1987, 1.10 **billion** pounds in 1988, and an estimated 1.6 **billion** pounds in 1989.[4] Emelle's recent history, then, is one of accepting over a **billion** pounds per year. App. C, at A-38, 729 F. Supp. at 797.

The District Court further found:

> Shipments, which include more than 100 flammable, corrosive, poisonous or cancer-causing chemicals . . . are accepted [by ChemWaste at Emelle] from America's ten largest companies, 159 military bases and other federal agencies, Alabama Power Company in Birmingham, Reynolds Metals in Sheffield, Occidental Chemical Corp. in Mobile, and 217 other customers in Alabama. . . .

Id. at A-38-39, 729 F. Supp. at 797.

The District Court found that "many of the wastes can blind, cripple or kill, . . . defoliate the environment, contaminate drinking water supplies and enter the food chain." *Id.* at A-38 & n. 6, 729 F. Supp. at 797 & n. 6.

In enacting the Holley Bill, the Alabama legislature made certain pertinent legislative findings:

> (2) The State of Alabama has a responsibility to protect the public health, welfare, and safety of its citizens by and through the enactment of laws designed to protect and preserve the environment from the health risks and endangerments associated with the treatment and disposal of hazardous wastes;

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[4]That was approximately 17% of all hazardous wastes commercially landfilled in the United States in 1989. *Chemical Waste Management, Inc. v. Alabama Department of Revenue*, No. 90-1098-PH, Circuit Court of Montgomery County, Alabama (Feb. 28, 1991), p. 8, now on appeal to the Supreme Court of Alabama, Case No. 190-1043 and 190-1044.

> (3) The United States Congress, recognizing the serious health threats and risks posed by the treatment and disposal of hazardous wastes to public health and the environment, enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") . . . as amended, which requires that each state demonstrate . . . that is [sic] has adequate capacity to treat, destroy, or secure disposition of all hazardous wastes reasonably expected to be generated within the state over the next 20 years;
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> . . . .
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> (8) The State of Alabama has, since 1978, accepted for treatment and disposal, disproportionate amounts of hazardous wastes generated within the borders of other states which have not taken steps to provide the assurance required by 42 U.S.C. [§] 9604(c)(9);
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> (9) The constant influx of the large volumes of hazardous wastes entering this state over and through congested state, county, and municipal highways and roads, coupled with the ever-increasing potential for traffic accidents and mishaps involving hazardous waste transporters, and the likelihood of leaks, spills, and/or explosions of said hazardous wastes resulting therefrom, altogether pose an unreasonable and unjustifiable risk to the health, safety, and welfare of Alabama's citizens.

App. D, Ala. Acts 1989, No. 89-788, § 1 (1989).

The Holley Bill prohibits any operator of a commercial hazardous waste treatment or disposal facility in Alabama from disposing of or treating hazardous wastes generated in any state that (1) prohibits the treatment or disposal of wastes within that state and which has no facility within that state for the treatment or disposal of hazardous wastes; or (2) has no such facility and has *not* entered into an interstate or regional agreement pursuant to CERCLA for the safe disposal of haz-

ardous wastes to which Alabama is a signatory. The legislation directs ADEM to create a list of states, revised monthly, from which hazardous wastes cannot be accepted.

B. Basis for Federal Jurisdiction.

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

This Court has never addressed a state's power to enact reasonable restrictions on the interstate movement of hazardous waste to protect public health and the integrity of the state's natural resources. Similarly, this Court has never addressed whether **hazardous** waste is an article of commerce entitled to full constitutional protection. Given the growing recognition and concern in the last 12 to 15 years of the national hazardous waste problem, these issues are important questions of Federal constitutional law which should be settled by this Court.[5] Also, until 1988 there was an automatic right of

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[5]Congress has found hazardous waste to be a significant national problem. The significance is illustrated by the number of major pieces of federal legislation regulating waste, and, more recently, specifically hazardous waste. The District Court's opinion contains an excellent review of the development of federal waste management legislation over the past forty years. See App. C, at A-30-31, 729 F. Supp. at 793-97. As to hazardous waste, Congress in 1976 enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987, which established a "cradle to grave" regulatory scheme for hazardous waste. Also in 1976 Congress enacted the Toxic Substances Control Act of 1976 (TSCA), Pub. L. 94-469, which was a comprehensive measure to protect the public and the environment from exposure to hazardous chemicals. In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986), which provided for the clean-up of hazardous waste sites and created Superfund, a federal fund for clean-up when the responsible parties do not do so. In 1986 Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, amending scattered sections of 42 U.S.C. §§ 9601-

appeal and review in a case such as this where a federal court of appeals invalidated a state statute as repugnant to the constitution. *See* former 28 U.S.C. § 1254(2) amended by Pub. L. 100-352, § 7 (1988). While there is no longer automatic review, the justification for discretionary review presumably is greater where a state statute raises a significant federal question of a character historically reviewed by this Court.[6] Further, the important issues involved in this case have led the Attorneys General of 13 states and the Texas Water Commission to give amicus support to the applicants in the court below.[7] The United States Department of Justice filed an amicus brief in support of ChemWaste. Both sets of amicus supporters participated in oral argument before the Court of Appeals.

Following the Love Canal episode in New York State, Congress has enacted several acts and made strong statements about the seriousness of the problem. *See* n. 5, *supra* at 8. The Alabama Legislature in enacting the Holley Bill made explicit legislative findings with respect to Alabama's legitimate concerns for the health, safety and welfare of Alabama's citizens. *See*, p. 6-7, *supra*.

9675 (Supp. IV 1986). SARA requires each state to demonstrate capacity to dispose of its hazardous waste for the next twenty years by disposal in in-state facilities or by regional or interstate agreements with other states which have excess capacity. In 1984 Congress passed the Hazardous and Solid Waste Amendments, Pub. L. 98-616, which established a comprehensive program to regulate the land disposal of hazardous wastes.

[6]Indeed, the legislative history shows the section was repealed to "substantially eliminate [] the mandatory or obligatory jurisdiction of the Supreme Court . . . to hear and decide . . . cases [that] *do not involve important issues of Federal constitutional law.*" "Review of Cases by the Supreme Court," House Report No. 100-600, at 766 (1988) (emphasis added). In contrast, this case does present important issues of Federal constitutional law.

[7]Those states are Arkansas, Arizona, Illinois, Indiana, Louisiana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, South Carolina, Utah, and Tennessee. The Texas Water Commission is the Texas state agency that was involved in *Alabama v. EPA*, *infra* at page 17 and which has responsibility for hazardous waste regulation in that state. The Sierra Club of Alabama also filed an amicus brief in support of Petitioners.

The real significance of the threat posed to our industrialized society by hazardous waste has only dawned over the past 10 to 15 years. The Emelle facility was one of the first permitted hazardous waste disposal facilities in the country. It was permitted in 1978, the same year *City of Philadelphia*, 437 U.S. 617 (1978), was decided. Due to the steadily increasing "not in my back yard" syndrome,[8] there have been almost no new permitted facilities since then.[9] As a result, it is undisputed that Alabama and a few other net importing states are handling a disproportionate share of the nation's hazardous waste disposal burden.

Congress addressed this inequity by enacting SARA.[10] The purpose of SARA is to develop additional facilities and agree-

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[8]In the Congressional hearings on the SARA amendments to CERCLA, the reluctance of states to site new treatment and disposal facilities was addressed:

> Unfortunately . . . Congress failed to anticipate the intensity of public opposition to new and expanded waste management facilities. While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrome (Not-In-My-Backyard]. Yet if RCRA and Superfund programs are to work — if public health and the environment are to be protected — the necessary sites must be made available.

132 *Cong. Rec.* S 14924 (Oct. 3, 1986) (Remarks of Senator Chafee). *See generally* Delogu, *"NIMBY" As a National Environmental Problem*, 35 S. Dak. L. Rev. 198 (1990).

[9]Only one commercial hazardous waste landfill (at Last Chance, Colorado) has been permitted in the last 10 years; and it has never operated or accepted waste and is presently for sale. *Chemical Waste Management, Inc. v. Alabama Department of Revenue*, No. 90-1098-PH, *supra* at 6.

[10]A senior EPA official addressed the legislative intent behind SARA:

> [P]olitical pressures encourage states to export their wastes to other states rather than to create available capacity . . . . By requiring . . . . agreements between states regarding future access to available interstate capacity, Congress counterbalanced these political pressures in exporting states with the political pressures in importing states that might oppose continued receipt of such exports.
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> . . . .

ments between states for hazardous waste management. One of the purposes of the Holley Bill is to focus the attention of net exporting states to the critical need to develop their own hazardous waste treatment or disposal facilities so as to alleviate the disproportionate share of the burden Alabama and a few other states are presently bearing. The reciprocity provisions of the Holley Bill advance the purposes of SARA by encouraging net exporting states to site new facilities or contract with other states for allocation of excess disposal capacity.

As a result of the Holley Bill (and prior to the August 8, 1990 opinion of the Court of Appeals), the states of Vermont and Mississippi passed legislation approving development of in-state hazardous waste disposal facilities, thereby exercising a new responsibility for their own hazardous waste problem. The negative result of the Court of Appeals' invalidation of the Holley Bill, however, is best illustrated by the actions of North Carolina.[11]

Prior to enactment of the Holley Bill, North Carolina (like Vermont and Mississippi) had no in-state hazardous waste treatment or disposal facility. North Carolina exported its hazardous waste to Alabama and other states. As a result of the Holley Bill, in special session of its legislature, North Carolina enacted legislation approving development of in-state hazardous waste treatment and/or disposal facilities. As a consequence, North Carolina was removed from Alabama's ban list.

> [T]here were some senators who were very concerned that states were not taking responsibility for their own hazardous waste. It is the same problem we have seen in the southeast until Alabama [with the Holley Bill] and South Carolina took some action. States were sitting back not wanting to take very controversial actions to site new facilities so this was put into the law to give some incentive to states to think about their own hazardous waste.

Thomas Nessmith, Chief, Policy Planning and Evaluation, U.S. EPA Region IV, "For the Record" Transcript, Sept. 13, 1989, Vol. II, Doc. 28.

[11]See Defendants' submissions of affidavits by correspondence of June 14 & 29, 1990 and "Defendants' Further Motion to Supplement the Record" of December 18, 1989.

However, after the August 8, 1990 invalidation of the Holley Bill by the Court of Appeals, North Carolina backed away from the effort.[12] The North Carolina reversal of responsible action directly resulted from the Court of Appeals' decision in this case holding that Alabama and other net importing states are powerless to encourage North Carolina and other states similarly situated to establish hazardous waste landfills and/or treatment facilities within their own borders.

Since enactment of the SARA amendments, Congressional action to alleviate this problem has been blocked. The Senators and Representatives from the net exporting states have, like their counterparts in their state legislatures, yielded to the NIMBY syndrome of their constituents and blocked efforts to provide specific relief to the relatively few net importing states. There is presently little incentive to do otherwise. A further negative factor is the heavy pressure from vested interests opposed to responsible legislation on the subject at either the national or state level.

In the absence of any prior decision by this Court on hazardous waste, the Court of Appeals incorrectly filled the void by applying the majority position in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The correct basis for decision, however, appears in *Maine v. Taylor*, 477 U.S. 131 (1986), this Court's most recent decision dealing with the regulation of interstate commerce to protect against environmental risks.

Maine v. Taylor

In *Maine v. Taylor* the State of Maine banned *all* importation of live baitfish. Notwithstanding that the statute facially discriminated against interstate commerce, this Court upheld the statute because the imported baitfish posed a *risk* to Maine's environment (to the survival of domestic fish) and there was insufficient technology to give Maine a nondiscriminatory alternative. The Court stated:

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[12] *See* BNA Envt'l Rept. 1597 (Dec. 28, 1990); and New York Times, March 11, 1991 at A20, col. 4.

> Moreover, we agree with the District Court that *Maine has a legitimate interest in guarding against imperfectly understood environmental risks,* despite the possibility that they may ultimately prove to be negligible. "[T]he constitutional principles underlying *the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . .* "

477 U.S. at 148 (emphasis added).

Maine contended it could not effectively identify and separate sick imported baitfish from healthy baitfish, so it was allowed to ban importation of *all* baitfish to avoid the environmental risk. The Court concluded:

> The Commerce Clause . . . does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to "place itself in a position of economic isolation," . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently" . . . .

477 U.S. at 151-52.

Hazardous waste is an "imperfectly understood" environmental risk. To be sure, it poses serious risks to human health and the environment, so much so that Congress has decided landfilling of hazardous waste should be discouraged and alternative disposal technologies developed.[13] In fact, the Dis-

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[13]In the Congressional findings accompanying the 1983 amendments to RCRA, Congress found that "reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impound-

trict Court found the hazardous waste buried in Alabama to consist of over 100 "flammable, corrosive, poisonous or cancer-causing chemicals" that can "blind, cripple or kill." 729 F. Supp. at 797.

What is most sobering is the *vast* quantities of these chemicals permanently buried in Alabama. In recent years over a *billion* pounds per year of hazardous waste have been shipped to Emelle. Hazardous waste is inherently dangerous. The risk in Alabama is compounded by the large volumes imported. It is uncertain what synergistic consequences these compounding volumes will produce. The legislative findings in the Holley Bill evidence an overriding concern by the Alabama Legislature for the health and environmental dangers arising from the *increasing volumes* of hazardous waste transported through the state and permanently buried at Emelle.

As recognized in *Maine v. Taylor*, protection of public health and the integrity of natural resources is a legitimate local interest. Furthermore, there is no lesser restrictive alternative. To ban all interstate hazardous waste at Alabama's borders would be *more* restrictive, as would be the closing of Emelle to in-state and as well as interstate hazardous waste. Hazardous waste cannot be rendered safe under present technology, nor may its ultimate consequences presently be more perfectly understood. Therefore, Alabama has addressed the problem with the least restrictive or discriminatory alternative — not by banning hazardous waste — but by attempting to impact the *volume* of wastes buried at Emelle by encouraging states now doing nothing to alleviate the problem to proceed with the siting of new facilities.[14] *Maine v. Taylor* holds that Alabama "need not sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such

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ment, should be the least-favored method of managing hazardous wastes . . . . 42 U.S.C. § 6901(b)(7).

[14]The Holley Bill conditionally restricts hazardous waste from some 22 states with no hazardous waste treatment or disposal facilities, or efforts under way to develop same.

consequences." *Id.* at 148. Alabama's enactment of the Holley Bill is a rational and legitimate extension of that philosophy and principle.

Stated differently, Alabama has a rational basis on which to treat certain out-of-state wastes differently. When such treatment is justified, the Commerce Clause is not offended. *New Energy Co. v. Limbach,* 486 U.S. 268, 100 L. Ed. 2d 302, 308, 108 S.Ct. 1803 (1988). Furthermore, reciprocity and other provisions that afford other states less favored treatment are permissible, so long as such treatment complies with the minimum requirements of the Commerce Clause. 100 L. Ed. 2d at 311. Speaking for a unanimous Court, Mr. Justice Scalia explained:

> Our cases leave open the possibility that a State may validate a statute that discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives . . . . This is perhaps just another way of saying that what may appear to be a "discriminatory" provision in the constitutionally prohibited sense — that is, a protectionist enactment — may on closer analysis not be so.

100 L. Ed. 2d at 311-12.

The Holley Bill is just such a measure. It is **not** a protectionist enactment. By encouraging other states to establish hazardous waste disposal and treatment facilities of their own and thereby reduce the volume of hazardous waste exported into Alabama for permanent burial, it protects Alabama's citizens and environment, not the state's commercial interests. The Holley Bill also facilitates Alabama's compliance with the SARA Amendments' capacity assurance provisions. The Holley Bill represents the least discriminatory and burdensome measure that the state could enact to achieve its legitimate goals.

There are compelling and justifiable reasons for the Holley Bill's conditional differentiation between hazardous waste from those states which are doing nothing about this national problem and those which are. The reciprocity clause in the

Holley Bill allows Alabama to keep its site open while pressing other states to resolve their problems in a way that satisfies the reciprocity condition. It encourages other states to address the problem, rather than continue blithely to export hazardous waste to the few net importing states. This increases the likelihood of the recalcitrant states bearing at least some of the burden, thereby decreasing the amount of the hazardous waste danger to Alabamians.

City of Philadelphia v. New Jersey

The linchpin of the Court of Appeals' reversal of the District Court was its incorrect application of one case: *City of Philadelphia v. New Jersey, supra.* But *City of Philadelphia* can and should be distinguished, for:

(1) Unlike the simple solid waste or garbage in *City of Philadelphia,* the instant case concerns hazardous waste, which is inherently dangerous in all aspects, including transportation as well as burial.

(2) Unlike New Jersey in *City of Philadelphia* with its garbage landfills, Alabama is **not** attempting to hoard its remaining hazardous waste landfill space.

(3) Unlike New Jersey in *City of Philadelphia,* Alabama is **not** trying to isolate itself from the common problem; Alabama is **not** erecting a rigid ban against the movement of all out-of-state hazardous waste.

(4) Unlike New Jersey in *City of Philadelphia,* Alabama is **not** imposing on out-of-state commercial interests the full burden of conserving Alabama's remaining hazardous waste landfill space; rather, the Holley Bill is a conditional ban aimed at en-

couraging the banned states to share in the local and national burden which they now totally avoid.

(5) Unlike New Jersey in *City of Philadelphia,* Alabama's actions are a reasonable and legitimate exercise of its police powers.

(6) Unlike New Jersey in *City of Philadelphia,* in the Holley Bill, Alabama has posed the same preconditions on out-of-state hazardous waste as its own.

(7) Unlike New Jersey in *City of Philadelphia,* Alabama's Holley Bill is a direct response to the Congressional mandate in SARA that the states work together in addressing this hazardous waste problem common to all.[15]

(8) Unlike New Jersey in *City of Philadelphia,* Alabama's Holley Bill is inclusive, **not** exclusive, in that any state can easily meet the pre-conditions for its removal from the ban (viz. Vermont, Mississippi, and temporarily, North Carolina, *supra,* 11-12).

However, in the opinion below, the Court of Appeals stated, "In concluding that hazardous waste is an object of commerce, we follow precedent of this circuit. *See State of Alabama v. United States EPA,* 871 F.2d 1548, 1555 n.3 (11th Cir. 1989) . . . . " App. A, at A-10, 910 F.2d 719. *State of Alabama* involved the issues of individual plaintiffs' standing to challenge a hazardous waste remedial action plan under the Fifth Amendment and CERCLA and whether subject matter jurisdiction existed. The court held there was no standing or jurisdiction. The court did **not** analyze any Commerce Clause issue. It was only in passing that the court observed in a footnote:

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[15]See paragraph 3 of the legislative findings in the Holley Bill. Page 7, *supra.*

> 3. To the extent plaintiffs also seem to assert injury based on the out-of-state nature of these wastes, the Supreme Court has already held that the commerce clause bars such a distinction. *City of Philadelphia v. New Jersey*, 437 U.S. 617 . . . (1978).

871 F.2d 1555 n.3.

That meager statement is now the basis for an expanding body of law on this exceedingly important national issue. Not only was there no analysis of this statement in *State of Alabama*, but the statement in the footnote is not correct. *City of Philadelphia* neither involved nor addressed hazardous wastes. Therefore, there is a whole body of precedent developing from a false premise: that nondangerous solid waste is the same as dangerous hazardous waste. Given the misperception and misapplication of the Court's opinion in *City of Philadelphia*, the instant case presents a vital opportunity to resolve this conflict in the law.

The dissent by Chief Justice Rehnquist in *City of Philadelphia*, which was in effect applied in the later case of *Maine v. Taylor*, *supra*, points the way to the proper decision in this case. The dissent would have upheld New Jersey's ban under the quarantine cases, finding that the solid waste *and the accumulation of increasing volumes of solid waste* posed potential risks such that solid waste should not be considered an article of commerce. "In my opinion, [the quarantine] cases are dispositive of the present one . . . . New Jersey should be free under our past precedents to prohibit the importation of solid waste because of the health and safety problems that such waste poses to its citizens . . . . I simply see no way to distinguish solid waste . . . from germ-infected rags, diseased meat, and other noxious items." *Id.* at 632-33 (Rehnquist, J., dissenting). For instance, the problems in dealing with a Love Canal incident are far, far different than those dealing with ordinary solid waste: the difference is dealing with toxic chemicals generated by industry on the one hand, and dealing with ordinary household garbage on the other. It is not appropriate to clothe hazardous

waste in the armament of an ordinary article of commerce entitled to normal constitutional protection.

"[S]tates can prohibit the importation of items 'which, on account of their existing condition, would bring in and spread disease, pestilence, and death . . . .' " *City of Philadelphia,* 437 U.S. at 631 (Rehnquist, J., dissenting). These "quarantine laws" are not considered protectionist measures even though they are directed against out-of-state commerce. *Id.*[16] The question in this case is whether chemical wastes that the trial court found can maim or kill and devastate the environment are to be treated more like articles that spread "disease, pestilence or death," or more like ordinary articles of commerce such as milk,[17] apples,[18] and wine.[19]

Hazardous waste poses the risk of disease and death. Many of the chemicals permanently buried in Alabama consist of poisons and carcinogens that will blind, cripple or kill. Hazardous waste is nothing more than toxic refuse from our economic operations. It has no intrinsic value or usefulness, but is to be promptly discarded. The present level of traffic in hazardous waste is not due to the value of the waste in commerce, but is due to the fact that because of local political pressures other states force it to be exported for burial in Alabama.

Congress has set the policy that alternative technologies be developed to eliminate or significantly reduce hazardous

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[16]Citing *Bowman v. Chicago & Northwestern R. Co.,* 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935); *Sligh v. Kirkwood,* 237 U.S. 52 (1915); *Asbell v. Kansas,* 209 U.S. 251 (1908); *Railroad Co. v. Husen,* 95 U.S. 465 (1878).

[17]*Dean Milk Co. v. Madison,* 340 U.S. 349 (1951).

[18]*Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333 (1977).

[19]*Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984).

waste.[20] Given that Congressional intent is to eliminate these dangerous and noxious substances, it cannot be said that hazardous waste is the typical legitimate article of commerce entitled to full protection of the Commerce Clause.

Alabama's declination to erect a total ban (as presumably it could under the quarantine laws and under the opinion of the Court of Appeals) does not legitimize hazardous waste as an article of commerce entitled to constitutional protection. While reducing the risk of epidemic disease requires an attempt to keep out the first germ, the risk of hazardous waste is directly proportional to the *volume* of waste. In the case of disease organisms, effective protection consists of a total ban of the germ that causes the condition. With hazardous waste, the risk can be minimized by controlling the volume of waste.

Alabama's legitimate state interest in protecting public health and the environment is all the more evident since the *full* risks associated with permanent burial of vast quantities of hazardous waste are, as yet, unclear. "I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety." *City of Philadelphia*, 437 U.S. at 632-33 (Rehnquist, J., dissenting).

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[20]The 1984 amendments to RCRA states:

> The Congress hereby declares it to be the national policy of the United States that wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat of human health and the environment.

42 U.S.C. § 6902(b). By enacting the SARA Amendments, Congress recognized that importing states have legitimate local interests in participating in the process that encourages exporting states to site new hazardous waste facilities. In effect, Congress encouraged and authorized states like Alabama to use their leverage.

In the alternative, if the original holding in *City of Philadelphia* is said to extend far enough to encompass hazardous waste, then it is time to revisit the case, given the developments over the past thirteen years following the issuance of that opinion. These developments include a much greater appreciation of the still not completely known dangers of hazardous waste, the vastness of the quantities of this toxic waste produced nationwide, and the current shame of a few states being required to bear disproportionately the national burden of hazardous waste disposal.

As aptly stated by Professor Delogu:

> . . . The difficulty of the NIMBY problem, coupled with the diversity that exists among the 50 states, suggests that this is one of those areas where we should not just tolerate but should invite that experimentation within the states that Justices from Brandeis to O'Connor have spoken of. *See* FERC v. Mississippi, 456 U.S. 742, 788 (1982) ("Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and politcal ideas. This state innovation is no judicial myth."); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Delogu, 35 S. Dak. L. Rev. at 210 n. 38.

CONCLUSION

Here we have a convergence of: (1) important Federal constitutional law issues of first impression, (2) a state statute invalidated by a Federal court of appeals, (3) the stated intent of Congress for state assistance in the safe management of hazardous waste, with emphasis on the development of further disposal and treatment sites, and (4) a few net-importing states currently being required to bear disproportionately the national burden of hazardous waste landfilling. Petitioners urge that the writ of certiorari be issued.

May 6, 1991

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
90-7047

Aug. 8, 1990

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, and Chemical Waste Management, Inc., Plaintiffs-Appellants,

v.

The ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; Leigh Pegues, Individually and as Director of the Alabama Department of Environmental Management; and Guy Hunt, Individually and as Governor of Alabama, Defendants-Appellees.

EDMONDSON, Circuit Judge:

The United States' largest and Alabama's only commercial hazardous waste management facility is located at Emelle, Alabama. The owner and operator of this facility, Chemical Waste Management, Inc. ("ChemWaste"), along with the National Solid Wastes Management Association, a trade association representing the waste management industry, brought this action seeking declaratory and injunctive relief, against the Alabama Department of Environmental Management; Leigh Pegues, Director of the Department; and Guy Hunt, Governor of Alabama (collectively referred to as "defendants" or "Alabama").

The suit challenges Ala.Code § 22-30-11 (Supp. 1989), known as the "Holley Bill," which prevents commercial waste management facilities like Emelle from accepting hazardous wastes generated in states other than Alabama unless the other states have met certain statutory requirements. Plaintiffs

also challenge two sets of Alabama regulations that require generators of hazardous wastes to receive the state's pre-approval before shipping wastes to management facilities in Alabama and that require certain wastes to be pretreated before disposal. *See* Ala.Admin.Code rr. 14-3-.08 & 14-9-.03 (1989). Before the challenged acts became effective, the Emelle facility accepted hazardous wastes for treatment, storage, and disposal from forty-eight states; eighty-five percent of the wastes disposed of at Emelle were generated outside Alabama.

Plaintiffs challenge the Alabama legislative and administrative acts on two grounds: that the acts are preempted by federal laws and regulations, and that the acts violate the commerce clause of the United States Constitution.[1] The district court granted summary judgment for defendants, finding the challenged actions to be constitutional. 729 F.Supp. 792. We have plenary review over the district court's decision. *See Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1040 (11th Cir. 1989).

In deciding this case, our job is not to make policy, but to interpret the federal legislation and regulations to determine Congress's intent and to interpret Alabama's legislative and administrative acts to determine whether they are consistent with the Constitution and the federal environmental statutory scheme. We recognize that serious problems associated with hazardous waste management plague our nation; but whatever our own views may be about the effectiveness of what Congress or Alabama has done, we can only apply the law. We accordingly vacate the district court's grant of summary judgment for defendants on the Holley Bill and on the regulations requiring pre-approval because those acts violate the commerce clause. We vacate summary judgment for defendants on the regulations that require pretreatment, to the extent

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[1]Plaintiffs' complaint also alleged that the acts violated the due process, takings, and contract clauses of the Constitution. The district court did not discuss these claims in its opinion, and we do not address the claims because we grant plaintiffs' requested relief on other grounds.

those regulations are dissimilar from regulations promulgated by the Environmental Protection Agency ("EPA"), because Congress has preempted Alabama's actions.

I. THE HOLLEY BILL

A. BACKGROUND

In 1980, the United States Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987) ("CERCLA"), designed to accomplish the cleanup of hazardous waste sites. CERCLA established liability standards for persons responsible for unsafe hazardous waste sites and created "Superfund," a fund that the federal government can use when responsible parties do not conduct the cleanups. *See* 42 U.S.C. § 9607. CERCLA provides for two types of cleanup actions: *remedial* actions, which are generally long-term or permanent containment or disposal programs, 42 U.S.C. § 9601(24); and *removal* efforts, which are usually short-term cleanup arrangements of a more immediate nature. 42 U.S.C. § 9601(23).

"A critical step in the implementation of a rational, safe hazardous waste program is the creation of new [hazardous waste disposal] facilities." 132 Cong.Rec. S14,924 (daily ed. Oct. 3, 1986) (statement of Sen. Chafee). Because Congress perceived that few states had developed programs to assure continued disposal capacity in the long run, Congress amended CERCLA in 1986 by enacting the Superfund Amendments and Reauthorization Act ("SARA"), Pub.L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10, 26 & 42 U.S.C.). "Congress was concerned that certain states, because of political pressures and public opposition, were not able to create and to permit sufficient facilities within their borders to treat and securely dispose of (or manage) the amounts of wastes produced in those states." Office of Solid Waste and Emergency Response, U.S. EPA, *Assurance of Hazardous Waste Capacity: Guidance to State Officials* [hereinafter

"EPA Guidance Doc."], at 2 (Dec. 1988). *See* S.Rep. No. 11, 99th Cong., 1st Sess. 22 (1985) ("Pressures from local citizens place the political system in an extremely vulnerable position.... The broader social need for safe hazardous waste management facilities often has not been strongly represented in the .... process [of creating new facilities]. A common result has been ... no significant increase in hazardous waste capacity over the past several years.").

The provision of SARA at issue in this case, section 104(c)(9), 42 U.S.C. § 9604(c)(9), requires that each state present a proposal to EPA showing that the state will have adequate capacity available to dispose of the hazardous wastes generated within the state for the next twenty years.[2] If the state does not provide such capacity assurances deemed adequate by EPA,[3] the state is prohibited from receiving

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[2]The full text of section 104(c)(9) is as follows:

(9) Siting

Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President that the State will assure the availability of hazardous waste treatment or disposal facilities which —

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,

(B) are within the State or outside the State in accordance with an interstate or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921 et seq.]

42 U.S.C. § 9604(c)(9) (brackets in original).

[3]States are required to submit a plan to EPA by October 17, 1989. 42 U.S.C. § 9604(c)(9). EPA contemplates that states will update these plans every two years because of the difficulties of projecting waste generation and of planning for waste disposal twenty years into the future. EPA Guidance Doc. at 6-7.

Superfund money for remedial cleanup actions taken within the state.[4]

Congress recognized that — because of geological factors or for other reasons — every state may not be able to create new disposal facilities within its borders and will not be able to dispose of its own wastes within its own borders for the next twenty years. SARA contemplates that a state may meet its section 104(c)(9) capacity assurance requirements by planning to use other states' disposal facilities and privately owned disposal facilities. 132 Cong.Rec. S14, 924 (daily ed. Oct. 3, 1986) (statement of Sen. Chafee). Section 104(c)(9) provides that a state may base its capacity assurance plan on such facilities if the state has entered into an agreement for the use of those facilities. 42 U.S.C. § 9604(c)(9)(B). For example, a state that cannot safely dispose of its wastes within its borders (an exporting state) may reach agreements with another state or group of states (importing states) under which the importing states agree to allocate a portion of their disposal capacity to the exporting state. An exporting state may also contract with a privately owned waste management facility. *See* EPA Guidance Doc. at 3; S.Rep. No. 11, 99th Cong., 1st Sess. 22 (1985). SARA places the burden of making capacity assurances on the exporting (waste generating state), and not on the importing state. SARA nowhere requires that an importing state enter into interstate or regional agreements, but most states will need to enter into such agreements because most states lack the capacity to dispose of all types of hazardous wastes within their borders.[5]

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[4]The availability of funds for *removal* actions is not affected because these are emergency actions to cleanup hazardous wastes posing an immediate threat. Funds are withheld for the long-term, permanent cleanup of sites on the National Priorities List. S.Rep. No. 11, 99th Cong., 1st Sess. 22 (1985).

[5]For example, a regional agreement between Alabama, Kentucky, South Carolina, and Tennessee allows Tennessee and Kentucky to use excess landfill capacity in Alabama and South Carolina. The agreement also allows the other three states to use Tennessee's excess aqueous treatment capacity and to use Kentucky's excess incineration capacity.

In the light of SARA's capacity assurance requirement and the concern of Alabama's leaders over the large amounts of other states' hazardous wastes being disposed of in Alabama,[6] the Alabama legislature in 1989 enacted Ala.Code § 22-30-11, popularly called the 'Holley Bill." This provision prohibits the owner or operator of a commercial hazardous waste management facility located in Alabama from treating or disposing of hazardous wastes generated in a state other than Alabama, if the other state either (1) prohibits the treatment or disposal of hazardous waste within its borders and has no facility for such; or (2) has no facility existing within that state for the treatment or disposal of hazardous waste and has not entered into an interstate or regional agreement for the disposal of its wastes to which Alabama is a signatory. The Holley Bill also prohibits commercial waste management facilities in Alabama from contracting with a state other than Alabama to satisfy the other state's capacity assurance obligation.[7]

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[6]During 1987, Alabama industries shipped about 57,000 tons of hazardous waste out of state for management, but the state imported about 500,000 tons of hazardous waste for treatment and disposal. Letter, dated July 27, 1989, to The Honorable Buddy Roemer, Governor of Louisiana, from Leigh Pegues. R-I-17-Exh. F. In a press release announcing enactment of the Holley Bill, Governor Hunt said that Alabama was "becoming the waste dump of the nation." *Gov. Hunt Announces States that are Prohibited from Shipping Hazardous Waste to Alabama,* Press Release, Aug. 29, 1989, at 2. R-I-17-Exh. G.

[7]The Holley Bill states, in pertinent part:

> (b) It is unlawful for any person who owns or operates a commercial hazardous waste treatment or disposal facility within this state to dispose or treat any hazardous wastes generated in any state outside the state of Alabama which:
>
> (i) Prohibits by law or regulation the treatment or disposal of hazardous wastes within that state and which has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; or
>
> (ii) Has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; unless that state has entered into an interstate or regional agreement for the safe disposal of hazardous wastes pursuant to the federal Comprehen-

Under authority of this bill, Alabama has issued a "blacklist" which, on September 13, 1989 (the effective date of the Holley Bill), precluded Emelle from accepting hazardous wastes from twenty-two states and the District of Columbia.[8] Between January 1, 1989 and October 1, 1989, Emelle received wastes from seventeen of the twenty-two states on the Holley Bill's blacklist. In addition, Emelle has ongoing contracts with waste generators in most of the banned states.

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sive Environmental Response, Compensation, and Liability Act. The department shall establish and maintain a list of states from which hazardous wastes cannot be accepted for treatment or disposal pursuant to this paragraph and there shall be no liability under the paragraph for disposal of wastes from a state until 15 days after a state has been listed by the department. Such list shall be publicly available and set forth the reasons why each state is listed. The date on which a state is included on such list shall be provided. The list of states shall be revised monthly. The state of generation as shown on the hazardous waste manifest shall be used in determining whether a person has treated or disposed of waste in violation of this subsection and any person who alters the state of generation on any manifest or misrepresents the state of generation of any hazardous waste for the purpose of circumventing this statute shall be punishable in accordance with section 22-30-19 herein.

(c) Subsequent to the effective date of Acts 1989, No. 89-788, no commercial hazardous waste treatment or disposal facility operating in this state may contract with states other than the state of Alabama in order to satisfy the Comprehensive Environment Response, Compensation, and Liability Act, as amended.

(d) For the purpose of this section, the following additional terms are defined:

(1) AGREEMENT. Any interstate or regional contract or agreement made pursuant to capacity assurance requirements of Section 42 U.S.C. § 9604(c)(9) of CERCLA and which one of the signatories to such contract or agreement is the state of Alabama.

. . . .

Ala.Code § 22-30-11.

[8]The Holley Bill requires that this list be updated monthly. Ala.Code § 22-30-11(b)(ii).

B. THE COMMERCE CLAUSE

Plaintiffs contend that the Holley Bill violates the commerce clause of the United States Constitution. U.S. Const., Art. 1, § 8, cl. 3. We agree. As discussed below, we hold that hazardous waste is an object of commerce, that the Holley Bill erects a barrier to the interstate movement of hazardous wastes, and that Congress did not — by enacting the SARA amendments to CERCLA — authorize this restriction on interstate commerce.

1. *Object of Commerce*

"All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622, 98 S.Ct. 2531, 2534, 57 L.Ed.2d 475 (1978). But when the dangers inhering in an object's movement "far outweigh [ ]" its worth in interstate commerce, a state can prohibit transportation of the object across state lines. *Id.* For example, the Supreme Court has said that a state may restrict interstate movement of an object when, on account of the object's "existing condition, [it] would bring in and spread disease, pestilence, and death." *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465, 489, 8 S.Ct. 689, 700, 31 L.Ed. 700 (1888) (striking down state prohibition on interstate movement of liquor); *see also Clason v. State of Indiana*, 306 U.S. 439, 442, 59 S.Ct. 609, 611, 83 L.Ed. 858 (1939) (upholding Indiana's prohibition against interstate transportation of large dead animals because "obvious purpose of the enactment [was] to prevent the spread of disease and the development of nuisances").

The Supreme Court in *City of Philadelphia v. New Jersey* expressly concluded that the interstate movement of solid and liquid wastes is commerce. 437 U.S. at 621-23, 98 S.Ct. at 2534-35. In that case, the Court rejected the lower court's conclusion that the waste was not an object of commerce because it was valueless and could not be put to effective use. The Court held that the innate danger of the solid and liquid waste did not outweigh its worth in interstate commerce.

Although the hazardous waste involved in this case may be innately more dangerous than the solid and liquid waste involved in *City of Philadelphia*,[9] we cannot say that the dangers of hazardous waste outweigh its worth in interstate commerce. Congress has defined hazardous waste as "a solid waste .... which ... may ... cause, or significantly contribute to a significant increase in mortality or an increase in serious ... illness, or ... pose a substantial present or potential hazard to human health or the environment when *improperly* treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5) (emphasis added). The legislative and executive branches of the federal government together with the separate states have developed a comprehensive scheme for regulating the management of hazardous waste. Waste generators, transporters, and managers must comply with highly technical and rigid rules designed to ensure that the movement of hazardous waste is accomplished with a minimum of danger to the public and to the environment. To the extent these rules can and do provide for the safe transportation of hazardous waste, the dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines.

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[9]The Supreme Court never described the waste at issue in *City of Philadelphia* as "hazardous"; the Court was apparently considering "solid waste," defined by Congress as: "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations and from community activities ...." 42 U.S.C. § 6903(27). The New Jersey statute and regulations, struck down by the Court, closed New Jersey's borders to all such wastes from other states, with the exception of four narrow categories of waste, including garbage fed to swine and municipal solid waste processed into fuel. *See City of Philadelphia*, 437 U.S. at 619 nn. 2 & 3, 98 S.Ct. at 2533 & nn. 2 & 3 (citing N.J.Stat.Ann. § 13-1I-1 *et seq.* (West Supp. 1978); N.J.Admin.Code 7:1-4.2 (Supp. 1977)).

In concluding that hazardous waste is an object of commerce, we follow precedent of this circuit. *See State of Alabama v. United States EPA*, 871 F.2d 1548, 1555 n. 3 (11th Cir. 1989) ("To the extent plaintiffs also seem to assert injury based on the out-of-state nature of these wastes [PCBs and other toxic wastes], the Supreme Court has already held that the commerce clause bars such a distinction." (citing *City of Philadelphia)), cert. denied sub nom. Alabama ex rel Siegelman v. United States EPA*, ___ U.S. ___, 110 S.Ct. 538, 107 L.Ed.2d 535 (1989). *Accord Hardage v. Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978) ("controlled industrial waste," defined in Oklahoma statute as refuse products that are toxic to human, animal, aquatic, or plant life, is within purview of commerce clause). In addition, this conclusion comports with the Holley Bill, which banned the transport of hazardous wastes into Alabama only from certain states, not from all states, thereby suggesting hazardous waste is not inherently too dangerous to be a product in commerce.

2. *Barrier to Interstate Commerce*

Because hazardous waste is an object of commerce and because the Constitution gives Congress the power to regulate the interstate movement of hazardous waste, a state's restriction of that movement is subject to constitutional scrutiny. *See City of Philadelphia*, 437 U.S. at 622-23, 98 S.Ct. at 2535. To determine whether the Holley Bill erects a barrier to interstate commerce, we follow the test set out by the Supreme Court in *City of Philadelphia:*

> [W]here simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible ap-

> proach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.* [397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174]

Id. at 624, 98 S.Ct. at 2535 (citations omitted). The crucial inquiry, therefore, is whether the Holley Bill is basically a protectionist measure, or whether it is based on legitimate local concerns with effects on interstate commerce that are only incidental. *Id.* at 624, 98 S.Ct. at 2536.

The district court below concluded that the Holley Bill was directed toward a legitimate state concern: complying with SARA's capacity assurance requirements. The district court said that the Holley Bill was "not an effort to isolate Alabama from the national economy." *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management,* 729 F.Supp. 792, 804 (N.D.Ala. 1990). We disagree. First, the Holley Bill is not required for Alabama to comply with section 104(c)(9)'s capacity assurance requirement. According to the Senate Report on SARA and the EPA Guidance Document, Alabama may satisfy its capacity assurance requirements by any combination of three measures: (1) creating new disposal capacity within the state, (2) entering into interstate or regional agreements allowing Alabama to use capacity located in other states, and (3) contracting with private waste management facilities. S.Rep. No. 11, 99th Cong., 1st Sess. 22 (1985); EPA Guidance Doc. at 3. If Alabama's capacity assurance plan depends on capacity provided by a commercial, privately owned management facility such as Emelle, the state should contract with the private facility for that capacity, instead of blocking the private facility from accepting wastes from other sites.

Second, while the Alabama legislature made a finding that large volumes of hazardous waste entering the state increased the likelihood of accidents and the risk to Alabama's citizens and environment, *see* Ala.Act. No. 89-788, Alabama did not ban the shipment of all hazardous wastes into the state, but only shipments from certain states. "[T]he evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia,* 437 U.S. at 626, 98 S.Ct. at 2536-37. Even if

Alabama's purpose in enacting the Holley Bill was to protect human health and the environment in Alabama, that purpose "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27, 98 S.Ct. at 2537. Plaintiffs presented testimony undisputed by defendants that the types of wastes accepted at the Emelle facility did not vary based upon the states in which the wastes were generated. The Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction.

Because Alabama's law is a protectionist measure not based adequately on a legitimate local concern, the district court was wrong to apply the *Pike v. Bruce Church, Inc.* balancing test. The Holley Bill does not regulate "evenhandedly" and its effects on interstate commerce are not merely incidental. *See Pike,* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). On its face, the Holley Bill discriminates against out-of-state waste generators and imposes on these generators the burden of conserving Alabama's remaining hazardous waste disposal capacity. We reject the district court's conclusion that, because Alabama closed its borders to only some states, Alabama is not hoarding its disposal capacity. Alabama has attempted to "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *City of Philadelphia,* 437 U.S. at 628, 98 S.Ct. at 2538.

Contrary to defendants' arguments, the Holley Bill does not fall within an exception to the commerce clause carved out by the so-called "quarantine cases." In these cases, the Supreme Court upheld state legislation that facially discriminated against out-of-state commerce involving articles that were highly dangerous. For example, the Court upheld a Maine statute that prohibited the importation of a certain type of baitfish not native to Maine because the baitfish contained a parasite that could have a serious detrimental effect on Maine's fisheries. *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). Such state laws do not discrimi-

nate against interstate commerce, however, but "simply prevent[] traffic in noxious articles, whatever their origin." *City of Philadelphia,* 437 U.S. at 629, 98 S.Ct. at 2538.

Alabama's selective ban on out-of-state hazardous waste is no quarantine law. Alabama did not ban hazardous wastes from all other states on the ground that the wastes were dangerous to some human health or environmental aspect which Alabama has a right to regulate. Alabama's ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation. The Holley Bill discriminates against interstate commerce.

3. *Congressional Authorization*

A state statute that erects a barrier to interstate commerce may nonetheless be upheld where Congress authorizes the state to regulate in such a manner. "Where state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce." *White v. Massachusetts Council of Constr. Employers, Inc.,* 460 U.S. 204, 103 S.Ct. 1042, 75 L.Ed.2d 1 (1983). "Congress may redefine the distribution of power over interstate commerce by permitting the states to regulate the commerce in a manner which would otherwise not be permissible. *South-Central Timber Devel., Inc. v. Wunnicke,* 467 U.S. 82, 87-88, 104 S.Ct. 2237, 2240, 81 L.Ed.2d 71 (1984). Such congressional intent or authorization for states to affect interstate commerce, however, must be "expressly stated" and "unmistakably clear." *Id.* at 91, 104 S.Ct. at 2242; *see also White,* 460 U.S. at 212-13, 103 S.Ct. at 1046-47 (city's requirement that certain percentage of work on public construction projects be done by local labor did not violate commerce clause because federal urban development programs "affirmatively sanctioned" improved opportunities for the poor, minorities, and unemployed. So, our task at this point is to determine whether Congress has authorized Alabama to erect its barrier to the interstate movement of hazardous wastes.

Defendants contend that SARA's section 104(c)(9) effected a redistribution of power over interstate commerce. According to defendants, the SARA amendments to CERCLA gave the states more responsibility for hazardous waste management, including an obligation to develop increased treatment and disposal capacity. But nothing in SARA evidences congressional authorization for each state to close its borders to wastes generated in other states to force those other states to meet federally mandated hazardous waste management requirements.[10] SARA places the burden of making capacity assurances for future hazardous waste management on the *generating state* and imposes a sanction on that state for failure to satisfy its obligation.[11] Congress has not, in our opinion, authorized Alabama to restrict the free movement of hazardous wastes across Alabama's borders. *See State of Alabama v. United States EPA*, 871 F.2d at 1555 n. 3 ("Although Congress may override the commerce clause by express statutory language, it has not done so in enacting CERCLA." (citing *Wunnicke*, 467 U.S. at 82, 104 S.Ct. at 2237)). If Congress intended to allow the states to restrict the interstate movement of hazardous wastes as Alabama has tried to do, Congress could (and still can) plainly say so.[12]

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[10]Defendants point out that, after the enactment of the Holley Bill, North Carolina took steps toward the creation of additional hazardous waste disposal facilities within its borders. *See* Ch. 168, 1989 North Carolina Session Laws. Even if, as defendants claim, this action was motivated in part by the Holley Bill, we reject defendants' argument that this activity legitimates Alabama's attempts to enforce the federal capacity assurance requirements set out in section 109(c). *See Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057, 1061, 89 L.Ed.2d 223 (1986) (states may not impose penalties on conduct already penalized under federal statutory scheme).

[11]The sanction, withholding of funds for remedial cleanups of Superfund sites on the National Priorities List, seems effective because, in March 1989, almost every state had at least one site on this list. *See* 40 C.F.R. Part 300, App. B (1989).

[12]For example, under the Low-Level Radioactive Waste Policy Act, 42 U.S.C. §§ 2021b-2021j (1982 & Supp. V 1987), states are encouraged to

II. THE CHALLENGED REGULATIONS

A. BACKGROUND

While CERCLA is designed to cleanup unsafe hazardous waste sites, the federal Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992k (1982 & Supp. V 1987), provides a "cradle-to-grave" regulatory program. RCRA sets minimum standards for the generation, treatment, storage, and disposal of hazardous wastes in the nation. Faced with a "growing body of evidence that *land* disposal of hazardous wastes . . . in many cases poses grave threats to public health and the environment," H.R.Rep. No. 98-198, Part 1, 98th Cong., 2d Sess. 20, *reprinted in* 1984 (U.S.Code Cong. Admin. News 5576, 5578 (emphasis added), Congress amended RCRA in 1984, prohibiting the disposal of certain highly toxic and mobile hazardous wastes in landfills unless those wastes are first treated to reduce toxicity and mobility using the best available demonstrated technology. *See* 42 U.S.C. § 6924(d)-(m). Because of a nationwide shortage of other types of disposal capacity and the time involved to implement advanced pretreatment programs, EPA exempted from this "land disposal ban" certain waste soil and debris generated in cleanups conducted under CERCLA and in corrective actions taken under RCRA until November 5, 1990. *See* 42 U.S.C. § 6924(h); 40 C.F.R. § 268; Land Disposal Restrictions for First Third Scheduled Wastes, 53 Fed.Reg. 31,137, at 31,143 (Aug. 17, 1988). In the language of EPA, the agency granted "variances" from the effective date of the land disposal ban for these certain wastes.

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enter into regional compacts to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste. 42 U.S.C. § 2021d. In this Act, which predates SARA, Congress expressly authorized states that enter into such compacts to ban waste shipments from states that neither enter into a compact nor meet federal deadlines for establishing their own facilities. 42 U.S.C. § 2021e(e)(2), (f)(1).

Corresponding to Congress's amendment of RCRA imposing the land disposal ban, Alabama amended its hazardous waste program by adopting the challenged land disposal restriction ("LDR") regulations, Ala.Admin.Code r. 14-9-.03. The LDR regulations are almost identical to the federal land disposal ban, except that Alabama did not adopt EPA's variances from the effective date of the ban for certain CERCLA and RCRA wastes. Alabama's prohibition of the land disposal of untreated wastes became effective August 24, 1989.

For the expressed purpose of facilitating enforcement of the LDR regulations, Alabama adopted the challenged pre-approval regulations, Ala.Admin.Code r. 14-3-.08.[13] These regulations prohibit a commercial hazardous waste management facility in Alabama from accepting wastes without specific pre-approval from the state. The regulations require that the generator of hazardous waste which is destined for disposal at a commercial facility in Alabama must apply for approval at least sixty days in advance of the shipment. The

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[13]Alabama's stated rationale for adopting the pre-approval regulations was to "verify that all waste is properly classified and waste that is subject to the land ban requirements is properly identified and has or will receive proper pretreatment." Rationale for Adoption of Emergency Hazardous Waste Regulations, Alabama Dep't of Envtl. Management. R-I-17-Exh. D. Alabama determined that it could not adequately enforce the LDR regulations without a pre-approval process. *See* Transcript of Public Meeting of the Envtl. Management Comm'n on Proposal for Adoption of Emergency Amendments to Hazardous Waste Regulations, Aug. 16, 1989. R-I-17-Exh. E.

The pre-approval regulations were originally adopted as emergency regulations under authority of Ala.Code §§ 22-22A-5 to -8, 22-30-11, & 41-22-5(b) (1984 & Supp. 1989); essentially identical permanent regulations have since been approved. Defendants contend that plaintiffs' challenge to the emergency pre-approval regulations is therefore moot. We reject this contention based on the Supreme Court's ruling that, when temporary regulations are superseded by substantially identical permanent regulations, the case is not moot so long as both sets of regulations present the same constitutional questions. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 413-14, 55 S.Ct. 241, 245, 79 L.Ed. 446 (1935).

generator does not need approval for each shipment, but must have approval for each waste stream, defined as "a waste of given characteristics that is unique to a particular process or individual generation site." Ala.Admin.Code r. 14-3-.08(5). Approval is valid for up to one year and can be renewed.

The pre-approval requirement allows Alabama to identify the wastes being disposed and to determine whether the wastes must be pretreated in accordance with the LDR regulations. The pre-approval regulations apply equally to wastes generated in Alabama and out of state, but no limitation is expressed on how long Alabama can wait before issuing its approval decision.

As a result of the LDR regulations, plaintiff ChemWaste claims that it has been forced to refuse shipments of waste from at least seven CERCLA or RCRA sites that are undergoing cleanups, even though it would have been able to accept those wastes at Emelle under the federal regulations. ChemWaste says that it has been forced to refuse new requests for waste disposal, as well as to refuse to fulfill its obligations under preexisting waste disposal contracts.

The district court below, without expressly discussing the challenged regulations, concluded that the regulations were constitutional. The district court's Memorandum Opinion addressed only the Holley Bill, but the court's Final Order said that all three challenged actions were constitutional. On appeal, Alabama made it clear that the challenged regulations are separate from and were not enacted to implement the Holley Bill.[14] After conducting a separate consideration of plaintiffs' claims regarding the regulations, we disagree with

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[14]The pre-approval regulations may implement the Holley Bill to the extent that the regulations allow Alabama to identify the origin of hazardous wastes. But because this effect seems incidental and because the stated purpose of the pre-approval regulations is to facilitate enforcement of the LDR regulations, we decline to strike the pre-approval regulations on the basis that the Holley Bill is unconstitutional.

the district court. To the extent that the LDR regulations fail to allow the same variances as those granted by EPA, the regulations are preempted and thus violate the supremacy clause. The independent effect of the pre-approval regulations, which require all waste generators to obtain the state's pre-approval before disposing of wastes at commercial facilities in Alabama, places an impermissible burden on interstate commerce. These pre-approval regulations are, therefore, also unconstitutional.[15]

B. LDR REGULATIONS

"[W]hen a state's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978). No such congressional purpose exists to preempt the entire field of interstate waste management, "either by express statutory command, or by implicit legislative design." *City of Philadelphia,* 437 U.S. at 621 n. 4, 98 S.Ct. at 2534 n. 4 (citations omitted). RCRA expressly says that "[n]othing in this chapter shall be construed to prohibit any State . . . from imposing any requirements . . . which are more stringent than [RCRA]." 42 U.S.C. § 6929. This language prevents a conclusion that Congress preempted all state regulation of hazardous waste management. *See ENSCO, Inc. v. Dumas,* 807 F.2d 743, 744-45 (8th Cir. 1986); *see also* 42 U.S.C. § 6902(a)(7) (objectives of RCRA — protecting health and environment and conserving valu-

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[15]Defendants contend that plaintiffs cannot properly challenge Alabama's regulations in this court because plaintiffs have not exhausted their administrative remedies. But there is no general requirement of exhausting administrative remedies before bringing a federal suit to invalidate state actions as unconstitutional. *See Alleghany Corp. v. Haase,* 896 F.2d 1046, 1050 (7th Cir. 1990).

able material and energy resources — are accomplished in part by establishing a viable federal-state partnership); H.R.Rep. No. 1491, 94th Cong., 2d Sess. 33, *reprinted in* U.S. Code Cong. & Admin. News 6238, 6271 (1976) ("federal preemption of this problem is undesirable, inefficient, and damaging to local initiative").

But in the 1984 amendments to RCRA, Congress did preempt Alabama's specific action of implementing a state land disposal ban that omits the variances ordered by EPA. In the RCRA amendments, Congress granted the EPA Administrator authority to establish an effective date for the land disposal ban different from the effective date which would have otherwise applied under the RCRA amendments. 42 U.S.C. § 6924(h)(2). Congress wrote that such alternative effective date must "be established on the basis of the earliest date on which adequate alternative treatment, recovery, or disposal capacity which protects human health and the environment will be available." *Id.*

Congress granted EPA alone the power to grant variances from the effective date for certain types of wastes because the lawmakers intended for the assessment of available pretreatment capacity to be made on a nationwide basis: "The available capacity determination is to be done on a national basis. Otherwise, different regions of the country would be receiving varying degrees of protection and could be used as a dumping ground for the rest of the county." S.Rep. No. 284, 98 Cong., 1st Sess. 19 (1983). When promulgating its regulations concerning the variances, EPA clearly stated the respective roles of EPA and the states: "The Administrator of EPA is solely responsible for granting variances to the effective dates [of the land disposal ban] because capacity determinations must be made on a nationwide basis." 53 Fed.Reg. 31,137, at 31,203 (Aug. 17, 1988). Alabama's LDR regulations attempt to "regionalize" pretreatment requirements, action which Congress expressly disapproved. *See* S.Rep. 284, 98th Cong., 1st Sess. 19 (1983). These regulations may not be lawfully enforced.

C. PRE-APPROVAL REGULATIONS

The pre-approval regulations supplement the LDR regulations: the pre-approval regulations require waste generators to obtain Alabama's approval before disposing of wastes at commercial facilities in Alabama. These regulations place an impermissible burden on interstate commerce.

We begin by recognizing that the pre-approval regulations apply equally to in-state and out-of-state waste generators. The regulations state that "[e]ffective November 30, 1989, all generators . . . must have approval for disposal by the Department, prior to disposal of any given waste stream." Ala.Admin.Code r. 14-3-.08(3). Plaintiffs, who have the burden of proving that Alabama's actions discriminate against interstate commerce, *see Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979), make no allegation that Alabama has somehow favored in-state waste generators by the state's application of these regulations, for example, by delaying or denying altogether requests from out-of-state generators.

Where the challenged state action does not on its face discriminate against interstate trade, we apply a balancing test to determine if the challenged acts violate the commerce clause: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847. If we find a legitimate local purpose, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

The pre-approval regulations impose a significant burden on the business of hazardous waste disposal. Under RCRA, generators must dispose of hazardous wastes within ninety days of generation or obtain a RCRA permit for hazardous

waste storage. *See* 40 C.F.R. § 262.34 (1989). Because the pre-approval regulations set no limit on how long Alabama can delay in responding to a request for approval, the pre-approval process can cause waste generators who wish to dispose of wastes in Alabama to expend time and money not only in complying with Alabama's special requirements, but also in complying with federal regulations that might not ordinarily come into play. In addition, Alabama can delay so long in granting a decision on approval that the regulations can be used to bar waste disposal completely in Alabama, forcing waste generators to take their waste elsewhere or to stop producing waste. The risk of long delay in approval is increased by the fact that the pre-approval regulations nowhere define the criteria by which Alabama will approve or disapprove a waste generator's request.

Because the regulations impose substantial economic burdens on both intrastate and interstate commerce, the local benefits must be great for these regulations to be valid. Alabama's only formally stated reason for adoption of the regulations — and the only reason argued to this court — was to facilitate enforcement of the LDR regulations, which are themselves unenforceable. We must conclude that the pre-approval regulations are too burdensome when compared to the local benefit and, therefore, invalidate the regulations as contrary to the Constitution.

III. CONCLUSION

Minimizing the dangers to public health and the environment created by uncontrolled an untreated hazardous wastes is an important task facing society. But Alabama's statute banning wastes selectively, based on state of origin, and the state's substantially burdensome pre-approval regulations cannot stand in the face of the Constitution's commerce clause. However honorable and well intentioned Alabama's leaders might be in coming to grips with environmental problems, "it is the duty of the courts to guard vigilantly against any needless in-

trusion" on "the protection afforded [interstate commerce] by the federal Constitution." *Bowman*, 125 U.S. at 492, 489 S.Ct. at 702. In addition, Alabama's regulation of hazardous waste land disposal is preempted by "the clear and manifest purpose of Congress" that EPA have the power to grant variances from the effectiveness of the land disposal ban on a nationwide basis. In such a case, "[u]nder the Constitution . . . the state law must yield to the federal." *Jones v. Rath Packing Co.*, 430 U.S. 519, 543, 97 S.Ct. 1305, 1318, 51 L.Ed.2d 604 (1977). The Constitution, here specifically the commerce and supremacy clauses, may not be encroached upon, even in an attempt to do something good for the environment.

We VACATE summary judgment for defendants, REMAND to the district court, and — because no material issues of fact remain — instruct the district court to enter summary judgment for plaintiffs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT
90 - 7047

Feb. 7,1991

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, and Chemical Waste Management, Inc., Plaintiffs-Appellants,

v.

The ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; Leigh Pegues, Individually and as Director of the Alabama Department of Environmental Management; and Guy Hunt, Individually and as Governor of Alabama, Defendants-Appellees.

BY THE COURT:

While rehearing is unwarranted, the possibility that portions of this case have been mooted has made necessary a modification of our original opinion.

I. *Mootness*

Recognizing our continuing "duty to review [the] jurisdiction of an appeal at any point in the appellate process," *Wahl v. McIver*, 773 F.2d 1169, 1173 (11th Cir.1985), we asked for briefs on the question of whether part of this case became moot on November 8, 1990. *See* Order, No. 90-7047 (Nov. 5, 1990).[1]

[1]Our obligation to review our jurisdiction is not relieved by the issuance of the original panel opinion because the mandate in this case has not yet issued. *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir.1983) (mootness can

As described in our opinion, see *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713, 722-23 (11th Cir.1990), the Environmental Protection Agency ("EPA") granted for certain wastes a national variance from the timetable for implementing the "land disposal ban" enacted by Congress in 1984. *See* 40 C.F.R. § 268; 42 U.S.C. § 6924(h) (authorizing EPA variances). This ban prohibited the disposal of toxic and hazardous wastes unless those wastes were first treated to reduce toxicity and mobility. Alabama amended its hazardous waste program by adopting the challenged land disposal restriction ("LDR") regulations, but the state did not adopt the EPA variances. *See* Ala.Admin.Code R. 14-9-.03.

In this lawsuit, plaintiffs challenged the Alabama LDR regulations, located at Ala.Admin.Code R. 14-9-.03(1)-(3), that did not adopt EPA variances for waste soil and debris generated in cleanups conoucted under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and in corrective actions under the Resource Conservation and Recovery Act ("RCRA").[2] The EPA variances

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require dismissal even "where mootness occurred after an appellate court had issued a decision but before the losing party could seek an en banc reconsideration and before the mandate had issued").

[2]The Alabama LDR regulations and EPA variances at issue in this lawsuit involve only two categories of wastes: (1) solvent- and dioxin-containing soil and debris from CERCLA responses or RCRA corrective actions, and (2) soil and debris contaminated with "California list" wastes from CERCLA response actions or RCRA corrective actions. *See* Complaint at Para. 21 ("This nationwide exclusion or variance thus covers[5] CERCLA wastes' and 'California list wastes'."); *id.* at Para ("These [LDR] regulations became effective August 24, 1989, thus prohibiting the land disposal of CERCLA and RCRA wastes and California list wastes at [plaintiff's] facility at Emelle, Alabama . . . "). Though plaintiffs have suggested that their lawsuit also challenged a conflict between federal and state regulation of another category of wastes, called "First Third wastes," we have found no support for that contention in the pleadings or in the district court's ruling below.

In their brief on the issue of mootness, plaintiffs also implied that the lawsuit challenged the broader language contained in another LDR provi-

for these wastes expired on November 8, 1990. *See* 53 Fed.Reg. 31,137, at 31,196-97 (Aug. 17, 1988). As a result, there is now no conflict between the challenged state LDR regulations and the relevant federal EPA regulations.

Defendants argue that because Alabama's challenged LDR regulations are now in harmony with the corresponding EPA regulations, the constitutional challenge to the LDR regulations on preemption grounds is moot. But, plaintiffs claim that the circumstances of this case fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. We agree with plaintiffs and, therefore, decline defendants' invitation to revisit that portion of our opinion.

At the outset, we note that plaintiffs "have sought, from the very beginning, *declaratory* relief as well as an injunction," thereby requiring us "to decide the appropriateness and the merits of the declaratory request irrespective of [our] conclusion as to the propriety of the injunction." *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 121, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974) (emphasis in original). The Supreme Court has held that where the need for injunctive relief is apparently mooted,

> The [remaining] question is 'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.' And since this case involves governmental action, we must ponder the broader consideration whether the short term nature of that action makes the issues presented here 'capable of repetition, yet

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sion as well. *See* Ala.Admin.Code 14-9-.06 ("All wastes subject to the disposal restriction of 40 C.F.R. Part 268 must have the mandated pretreatment of 40 C.F.R. Part 268 prior to land disposal in the Sate of Alabama."). This section was adopted several months after this lawsuit was filed, however; and we see no indication from the pleadings that this regulatory provision was a subject of this suit.

> evading review,' so that petitioners are adversely affected by government 'without a chance of redress.'

Id. at 122, 94 S.Ct. at 1698 (citations omitted).

To satisfy the "capable of repetition, yet evading review" exception to mootness, the Supreme Court has required that (1) there be a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party," and that (2) the "challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration." Murphy *v. Hunt,* 455 U.S. 478, 482-83, 102 S.Ct. 1181, 1183-84, 71 L.Ed.2d 353 (1982) (citations omitted).

The first part of this test has already been satisfied. Though there is no longer a live controversy over disharmony between EPA variances and the challenged LDR regulations, the EPA has already adopted additional national variances exempting from pretreatment requirements other types of hazardous wastes. *See* 40 C.F.R. § 268.34(d) (variance for "Second Third wastes"); 54 Fed.Reg. 26,594, at 26,639-40 (June 23, 1989) (same); 40 C.F.R. § 268.35(d), (e), (h) (variance for "Third Third wastes"); 55 Fed.Reg 22,520, at 22,533, 22,649-50 (June 1, 1990) (same). Alabama has once again adopted the national pretreatment standards for these additional types of wastes, and Alabama has once again rejected the EPA-granted variance. *See* Ala.Amin.Code R. § 14-9-.03(5)-(6). Alabama has also adopted two LDR regulations since this lawsuit was filed that purport to reject EPA variances inconsistent with Alabama LDR regulations. *See* Ala.Admin.Code R. 14-9-.06 ("All wastes subject to the disposal restrictions of 40 C.F.R. Part 268 must have the mandated pretreatment of 40 C.F.R. Part 268 prior to land disposal in the State of Alabama."); *id.* §14-9-.00 ("Any provision of 40 C.F.R. which is inconsistent with the provisions of [] Administrative Code Rule 335-14-9-.06 is not incorporated herein by reference."). The parties in this case are still involved in ongoing disputes about the extent to which a state, given EPA regulations and variances on point,

can interfere with the operation of waste disposal facilities. Thus, a sufficient likelihood exists that plaintiffs will again be harmed "in a similar way." *See generally Honig v. Doe,* 484 U.S. 305, 323, 108 S.Ct. 592, 604, 98 L.Ed.2d 686 (1988) (discussing "capable of repetition" standard).

The second part of the "capable of repetition, yet evading review" test is also satisfied by the facts of this case. The history of this litigation suggests that EPA variances are probably too short-lived for the conflict between the federal and state regulation to be resolved by careful consideration in federal court before the variances expire and the conflict disappears. For example, the existing EPA variance for "Second Third wastes" expires on June 8, 1991, *see* 54 Fed.Reg. at 26,639-40, and the Alabama regulation that did not adopt this variance was enacted on October 31, 1990, leaving only a little more than seven months for judicial resolution of the state-federal conflict.

Because we see the controversy involved here as one "capable of repetition, yet evading review," we rejects defendants' suggestion that the portion of our opinion addressing the challenge to certain of Alabama's LDR regulations has become moot. We believe incidentally that our discretion in deciding the issue of mootness is particularly broad when, as here, there are other issues in the appeal that are plainly not moot so that we are not faced with the question of the existence of a case or controversy for the purposes of jurisdiction over the appeal as a whole. *See generally Powell v. McCormack,* 395 U.S. 486, 495-500, 89 S.Ct. 1944, 1950-53, 23 L.Ed.2d 491 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy.").

II. *Pre-Approval Regulations*

Even though we decide today not to revisit the portion of our original opinion addressing the challenge to Alabama's LDR regulations, we agree with defendants that we must re-

consider our holding on the constitutionality of Alabama's "pre-approval regulations." As outlined in our original opinion, 910 F.2d at 722-25, the pre-approval regulations require waste generators to obtain Alabama's approval before disposing of wastes at commercial facilities in Alabama. *See* Ala.Admin.Code R. 14-3-.08.

We held that the pre-approval regulations did not facially discriminate against interstate commerce, requiring us to determine their constitutionality by use of a balancing test: *"if we find a legitimate local purpose,* 'the extent of the burden [on interstate commerce] that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'" 910 F.2d. at 724 (emphasis added) (quoting *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970)). We noted that "Alabama's only formally stated reason for adoption of the regulations—and the only reason argued to this court—was to facilitate enforcement of the LDR regulations, which are themselves unenforceable." 910 F.2d at 725. With the expiration of the several EPA variances, at least a portion of the LDR regulations are now in harmony with EPA regulations and are lawfully enforceable. As a result, our stated reason for concluding there existed no local purpose for the pre-approval regulations has been undercut.

The district court did not address what burden the pre-approval regulations imposed on interstate commerce, concluding without comment that both the LDR regulations and pre-approval regulations were constitutional. The extent of the burden on commerce was not a material issue in our original opinion because the pre-approval regulations lacked a legitimate local purpose. After reviewing the record, we are convinced that there now exists a genuine issue of material fact: the extent of the burden imposed on interstate commerce by the pre-approval regulations.

Our original opinion disposed of the challenge to the pre-approval regulations by vacating summary judgement for de-

fendants and remanding to the district court. Because "no material issues of fact remain[ed]," 910 F.2d at 725, we instructed the district court to enter summary judgement for plaintiffs. We now modify that disposition as follows: part II-C of our original opinion is hereby withdrawn; the district court's grant of summary judgement to defendants on the constitutionality of the pre-approval regulations is VACATED; and we REMAND to the district court for further proceedings on the remaining issues: the extent of the burden imposed by the pre-approval regulations on interstate commerce and the constitutionality of those regulations.

Except to the extent that our original opinion has been modified in this order, the petition for rehearing is DENIED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
89-G-1722-W

Jan. 12, 1990

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, and Chemical Waste Management, Inc., Plaintiffs,

v.

The ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; Leigh Pegues, as Director of the Alabama Department of Environmental Management; and Guy Hunt, as Governor of Alabama, Defendants.

MEMORANDUM OPINION

GUIN, District Judge.

During the last four decades the United States has had to reevaluate its attitude toward conservation of its natural resources and protection of the environment. As public awareness has increased, numerous laws to protect the health and welfare of the people and to protect the environment have been enacted. In the early 1950's the Public Health Service Act, 42 U.S.C. § 241 (1970) was passed. By this legislation the Surgeon General was empowered to promote and to coordinate research and studies relating to the causes of pollution and the prevention of diseases resulting therefrom.

In the next decade Congress enacted the Solid Waste Disposal Act of 1965, Pub.L. No. 89-272, title II, 79 Stat. 997, 42 U.S.C. §§ 3251-3259 (1965), which directed the Department of Health, Education and Welfare, under the auspices of the Bureau of Solid Waste Management, "to provide technical

and financial assistance to States and local governments ... in the planning and development of resource recovery and solid waste disposal programs." Solid Waste Disposal Act of 1965 § 3255 (Supp. I 1965), *as amended,* 42 U.S.C. § 3254a (1970). The act defined solid waste as "garbage, refuse, and other discarded solid materials, including solid-waste materials resulting from industrial, commercial, and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources." 42 U.S.C. § 3252(4) (1970).

The Resource Recovery Act of 1970 amended the Solid Waste Disposal Act of 1965 to read "(1) to promote the demonstration, construction, and application of solid waste management and resource recovery systems which preserve and enhance the quality of air, water, and land resources; ... (4) to provide for the promulgation of guidelines for solid waste collection, transport, Beparation, recovery, and disposal systems." 42 U.S.C. § 3251(b). This act established the Environmental Protection Agency [hereinafter EPA] which took over the functions of the Department of Health, Education and Welfare's Bureau of Solid Waste Management. Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 Compilation), *reprinted in* 84 Stat. 2086 (1970), 42 U.S.C. § 4321 note.

In 1973, the EPA listed Sumter County as a good place for a hazardous waste site because it sits on a thick layer of chalk.[1] White, *Who Ships Toxic Waste?,* The Birmingham News, November 26, 1989, at 1, col. 2.

The Resource Conservation and Recovery Act of 1976 [hereinafter RCRA], Pub.L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C.A. §§ 6901-6987 (West Supp. 1977), was the

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[1]Water doesn't pass easily through the 700 feet of chalk that lies between the surface and the underground water. Mississippi has the same chalk formations as Alabama. Georgia has lots of clay. White, *Who Ships Toxic Waste?,* The Birmingham News, November 26, 1989, at 1, col. 2 (quoting Buddy Cox who heads the Hazardous Waste Division for the Alabama Department of Environmental Management).

congressional response to the solid waste management problem and the public's attitude toward its disposition. "Everyone wants us to pick up the trash, but no one wants us to put it down." *Symposium on Resource Conservation and Recovery, House Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 2d Sess. 6 (1976) (quoted in W. Kovacs,[2] and J. Kluesik,[3] *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976,* 3-4 Colum.J.Envt'l Law 205, 206 (1977). "The Act's primary focus is on the problems associated with municipal solid waste, government procurement of recovered materials, federal facilities, and hazardous waste." *Id.* at 221.

One objective of RCRA was to "preserve and enhance the quality of air, water, and land resources." 42 U.S.C.A. § 6902(7). To attain this, and other objectives, Congress set four goals: 1) An Office of Solid Waste was established within EPA; 2) A "cradle to grave" system for regulating hazardous waste, to be administered by the federal government unless the states decided to administer the programs, was established; 3) The states were encouraged to establish solid waste control plans including provision for closing open dumps; and, 4) An expanded federal ruling in research and development was continued. Anderson, *The Resource Conservation and Recovery Act of 1976: Closing the Gap,* 78 Wis.L. Rev. 633, 646 (1978).

Under RCRA, EPA is required to establish minimum federal standards applicable to all who generate (42 U.S.C.A. §6922), transport (42 U.S.C.A. § 6923), treat, store or dispose (42 U.S.C.A. § 6924) of hazardous wastes. EPA is given the authority to issue administrative orders or to file suit in

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[2]William L. Kovacs is the former Chief Counsel for the United States House of Representatives Subcommittee on Transportation and Commerce.

[3]John F. Kluesik is the former Special Assistant to the United States House of Representatives Subcommittee on Transportation and Commerce.

order to enforce the minimum standards. The provisions relating to hazardous wastes are mandatory. The term "hazardous waste" means nonradioactive hazardous waste. Anderson, 78 Wis.L. Rev. at 639 (1978). RCRA defines it in the following manner:

> [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristic may —
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C.A. § 6903(5) (West Supp. 1977).

Kovacs and Kluesik make the following comments about RCRA:

> [W]ith hazardous waste there existed adverse health effects coupled with little market demand for the waste. The congressional intent respecting hazardous waste was to regulate, since without such regulation it would remain economically advantageous to dispose of the hazardous wastes in an environmentally unsound manner. The Act stresses planning and coordination between neighboring jurisdictions and among other environmental laws so that a future crisis, such as cities running out of landfill, shortage of materials, or the poisoning of drinking water supplies can be avoided."

Kovacs and Kluesick, 3-4 Colum.J.Envt'l Law at 223.

In order to implement state plans Congress recognized the necessity of overcoming the states' move toward balkanization over solid waste problems. It, therefore, offered incentives to states to cooperate: financial aid and technical assistance. "If a state does not develop or implement a solid waste manage-

ment plan for its municipal waste, it does not receive federal financial or technical assistance. Under the Act the EPA has no regulatory authority to require state implementation of any federal standards relating to municipal waste management." *Id.* at 221. If a state does assume the responsibility for implementing and enforcing the RCRA standards, in lieu of EPA, its program must be at least equivalent to the minimum federal standards.[4] "The state standards can be more stringent than the federal standards." Kovacs and Kluesick, 3-4 Colum.J. Envt'l Law at 226. "[I]n states with their own programs, the hazardous waste management requirements may be more stringent than the federal regulations." *Id.* at 228.

While an earlier draft of section 3009 of RCRA was entitled "Preemption of State Law," H.R.Rep. No. 14496, 94th Cong., 2d Sess. (June 22, 1976), when the legislation was enacted, the section was entitled "Retention of State Authority," RCRA § 3009, 42 U.S.C.A. § 6929 (1977), indicating it was not the intention of Congress for RCRA to preempt state law. The most clear-cut reference to preemption in the House report is the following statement: "At this time federal preemption of this problem is undesirable, inefficient, and damaging to local initiative." H.R.Rep. No. 94-1491, 94th Cong., 2d Sess. 33, *reprinted in* [1976] U.S. Code Cong. & Admin.News 6238, 6271. Nor was federal preemption championed by EPA. In *Resource Recovery and Conservation Act of 1976: Hearings on H.R. 14496 Before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce,* 94th Cong. 2d Sess. (1976) (statement of Shelton Meyers, Deputy Assistant Administrator for Solid Waste Management Programs, Environmental Protection Agency), Mr. Shelton stated:

> We note with interest the bill's emphasis on State primacy in terms of hazardous wastes regulatory pro-

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[4]RCRA § 3009, 42 U.S.C.A. § 6929 (1977) reads: "Upon the effective date of regulations under this subtitle no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulation.

> gram operations. We also believe that strong State regulatory programs are the most effective way to assure appropriate management of state wastes. Thus, the agency does not support a federally operated permit program or total Federal preemption of ineffective State efforts.

Congress directed that the waste regulations must "protect human health and the environment." 42 U.S.C.A. §§ 6922-6924. The regulations do not require EPA to consider economic and technical limitations. "The decision to omit consideration of the economic and technological limitations in the development of the hazardous waste regulations may be found in the legislative history of the Act. As reported from the House Committee on Interstate and Foreign Commerce, H.R.Rep. No. 14496, 94th Cong., 2d Sess. (1976), carried the congressional directive to "reasonably protect human health and the environment." Kovacs and Kluesik, 3-4 Colum.J.Envt'l Law at 226. Since the Senate language differed, the compromise omitted the word "reasonable." The compromise set a tougher standard. RCRA §§ 3002-3004, 42 U.S.C.A. §§ 6922-6924 (West Supp. 1977).

Although RCRA does not give EPA authority to limit the creation of hazardous waste, it does give EPA considerable control over its actual management. Kovacs and Kluesik, 3-4 Colum.J.Envt'l Law at 228. States with hazardous waste plans equivalent to EPA standards, however, may manage their own programs. To assist them the act requires that federal guidelines be published. These guidelines are "not to preempt state or local initiatives at managing the problem." H.R.Rep. No. 94-1491, 94th Cong. 2d Sess. 33 (1976); S.Rep. No. 988, 94th Cong., 2d Sess. 10 (1976), 1976 U.S.Code Cong. & Admin. News p. 6271. The act requires that guidelines be set establishing solid waste management regions. RCRA §§ 4002, 4004, 4005, 42 U.S.C.A. §§ 6942, 6944, 6945 (West Supp. 1977). The purpose of these guidelines is to "assist States to identify and develop appropriate areas within the State or interstate regions for discarded materials planning." H.R.Rep. No. 1491,

94th Cong., 2d Sess. 32-33 (1976), 1976 U.S.Code Cong. & Admin.News pp. 6270, 6271. To receive federal assistance RCRA requires solid waste regions be established. Regions are based on EPA guidelines such as population, geography, volume of waste and means of transportation within the area. RCRA § 4006(a), 42 U.S.C.A. § 6946(a) (West Supp. 1977).

RCRA further requires publication of guidelines to prevent ground and surface water contamination. The guidelines are aimed at providing at a minimum for "protection of the quality of ground waters and surface waters from leachates," and "protection of the quality of surface waters from runoff through compliance with effluent limitations under the Federal Water Pollution Control Act." RCRA §1008(a)(2)(B), (C), 42 U.S.C.A. § 6907(a)(2)(B), (C) (West Supp. 1977).

In 1976 Congress expressed additional concern over the environment by passage of the Toxic Substances Control Act of 1976, [hereinafter TSCA] Pub.L. No. 94-469, S.Rep. No. 94-698, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S.Code Cong. & Admin.News 4491, 4494, a comprehensive measure to protect the public and the environment from exposure to hazardous chemicals. 1976 U.S.Code Cong. & Admin. News at 4493. In making findings and stating the policy and intent of the legislation, Congress noted the unreasonable risk of injury to health[5] and the environment by exposure to chemicals and found regulation of such chemicals in interstate commerce necessary. *Id.* at 4504.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub.L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986) [hereinafter CERLA], also known as the "superfund" law, was enacted in 1980 and revised by the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613 (1986) (amending scattered

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[5]The act noted adverse effects of toxic chemicals on the human body vary. Included among the effects are birth defects and genetic damage. 1976 U.S.Code Cong. & Admin.News at 4495.

sections of 42 U.S.C. §§ 9601-9675 (Supp. IV. 1986) [hereinafter SARA]. CERLA's "principal purpose is the cleanup of leaking hazardous waste disposal sites." R. Findley & D. Farber, *Environmental Law* 169 (1988). An important part of CERLA is federal negotiation with owners of sites of cooperative agreements for cleanup. *Id.* at 172. These owners, in turn, may seek recovery of cleanup costs from potentially responsible parties. Of particular note is the observation that: "Offsite transport and disposal of the hazardous substances or contaminated materials are least favored where 'practical [on-site] treatment technologies' are available." *Id.* at 172-73.

Pertinent to the case at bar is Section 9604(c)(9) Siting, which reads as follows:

> Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which —
>
> (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,
>
> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
>
> (C) are acceptable to the President, and
>
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 1 *et seq.*]

SARA revitalized CERLA with the establishment of the Hazardous Substances Superfund and funding of an additional 8.5 billion dollars. Note, *Misery Loves Company: Spreading the Costs of CERLA Cleanup,* 42 Vand.L.Rev. 1469 (1989).

In 1984 Congress passed the Hazardous and Solid Waste Amendments of 1984, Pub.L. No. 98-616, H.R.Rep. No. 98-198, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S.Code Cong. & Admin.News 5576, 5640, which established a comprehensive program to regulate the land disposal of hazardous wastes. The act strives to see that hazardous wastes are managed properly and "to ensure that land disposal is used only for those wastes for which it can reasonably by [sic] anticipated to be protective of human health and the environment in the very long term, even if there are no treatment alternatives." Sec. 5, 1984 U.S.Code Cong. & Admin.News p. 5640. Land disposal of hazardous wastes, 1984 U.S.Code Cong. & Admin.News at 5589. Subsection (c) empowers the Administrator to prohibit land disposal of specified hazardous wastes "[b]ased upon the Committee's belief that land disposal is the least desirable management practice." 1984 U.S.Code Cong. & Admin.News at 5590.

Soon thereafter, in May 1985, a nationwide ban prohibited burying liquids in hazardous waste landfills. White, *Is Emelle Safe?*, The Birmingham News, November 27, 1989, at 1, Col. 4.

In the same year Alabama saw a significant increase in hazardous wastes shipped to the Emelle site in Sumter County, an increase of less than 200 million pounds in 1978 to 682 million pounds in 1985. White, *Who Ships Toxic Waste?*, The Birmingham News, November 26, 1989, at 18A, col. 1. Shipments of hazardous waste to Emelle continued to rise from the 1985 level to 912 million pounds in 1986, 1.13 billion pounds in 1987 and 1.10 billion pounds in 1988. *Id.* An estimated 1.6 billion pounds of waste would be buried at Emelle in 1989. *Id.* at 1, col. 2. All of this has resulted in the Emelle site, owned by Chemical Waste Management, Inc. [hereinafter Chem-Waste], having become the largest landfill site where toxic waste is buried for a fee. White, at 18A, col. 1.[6] Shipments,

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[6]According to Title III of RCRA entitled Hazardous Waste Management, Resource Conservation and Recovery Act of 1976, Pub.L. No. 94-580, H.R.Rep. No. 94-1491, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S.Code

which include more than 100 flammable, corrosive, poisonous or cancer-causing chemicals, *Id.*, at 18A, col. 2, are accepted from America's ten largest companies, 159 military bases and other federal agencies, Alabama Power Company in Birmingham, Reynolds Metals in Sheffield, Occidental Chemical Corp. in Mobile, and 217 other customers in Alabama. *Id.* at 1A, col. 2. Even so, less than three-tenths of one percent of America's toxic waste gets buried at Emelle.[7] *Id.*, at 18A, col. 2.

In response to the "dumping" at Emelle, when faced with the question of whether all of the states should bury their wastes in Alabama or whether they should do something about their wastes, the State of Alabama enacted Act No. 89-788, known as the Holley Bill, to amend Alabama Code section 22-30-11(b) (1975). The purpose of the bill is set forth in the introductory paragraph which reads as follows:

> [T]o provide for additional definitions and to prohibit commercial hazardous waste treatment or disposal facilities from accepting hazardous wastes generated in another state which prohibits the treatment, storage, or disposal of hazardous wastes within its own borders, or which refuses or fails to comply with 42 U.S.C. § 9604(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, which requires each state to adequately treat and dispose of all hazardous wastes reasonably expected to be generated within that state over the next 20 years through the establishment of a hazardous waste treatment or disposal fa-

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Cong. & Admin.News, 6238, many of the wastes can blind, cripple or kill. 1976 U.S. Code Cong. & admin. News at 6249. They can defoliate the environment, contaminate drinking water supplies and enter the food chain. *Id.*

[7]Some of this percentage comes from states that have complied with federal legislation previously outlined. The court, therefore, is being asked to decide whether a partial ban on less than three-tenths of one percent is an onerous burden on interstate commerce.

cility within the state of through the use of a hazardous waste treatment of disposal facility located outside the state in accordance with an interstate agreement or regional agreement or authority.

Because the court has been asked to determine the constitutionality of the Holley Bill, pertinent portions are set forth fully below:

Sec. 1. The legislature finds that:

(1) The generation, management, and disposal of hazardous wastes is a cause of continuing concern to the citizens of this state;

(2) The State of Alabama has a responsibility to protect the public health, welfare, and safety of its citizens by and through the enactment of laws designed to protect and preserve the environment from the health risks and endangerments associated with the treatment and disposal of hazardous wastes;

(3) The United States Congress, recognizing the serious health threats and risks posed by the treatment and disposal of hazardous wastes to public health and the environment, enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. 9604(c)(9), as amended, which requires that each state demonstrate by October 17, 1989, that is [sic] has adequate capacity to treat, destroy, or secure disposition of all hazardous wastes reasonably expected to be generated within the state over the next 20 years through the establishment of a hazardous waste treatment or disposal facility located within its borders, or through the use of a hazardous waste treatment or disposal facility located outside the state in accordance with an interstate agreement or regional agreement or authority;

(4) In enacting the capacity assurance requirements, Congress recognized that local pressures have impeded the siting of new hazardous waste treatment and disposal facilities in the nation in the past sev-

eral years, and if the Federal Resource Conservation and Recovery Act as amended ("RCRA") and CERCLA are to work properly, such additional sites must be made available. Since Alabama is already bearing far more than its fair share of the burden of managing hazardous wastes, it is only equitable that new capacity be developed in other states which have failed to assume their own obligations to site such facilities.

(5) Both Congress and the U.S. Environmental Protection Agency have recognized that the capacity assurance provisions of CERCLA would be used to force the development of new capacity to manage hazardous wastes. Implicit in the CERCLA capacity-assurance procedure is a recognition that an importing state might refuse to enter into an agreement with an exporting state, requiring the exporting state to create available capacity through waste reduction or through siting new facilities, or enter into an agreement with another state to manage these wastes;

(6) The State of Alabama has enacted and implemented an approved program for the handling and disposal of hazardous wastes within its borders, known as the "Hazardous Wastes Management and Minimization Act," and has established regulations and guidelines for the treatment, storage, and disposal of all hazardous wastes generated within the state, and continues to evaluate and update those regulations and guidelines;

(7) The State of Alabama, since 1978, has had an adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state over the next 20 years through the establishment and continued existence of commercial hazardous waste facilities within the state;

(8) The State of Alabama has, since 1978, accepted for treatment and disposal, disproportionate amounts of hazardous wastes generated within the

borders of other states which have not taken steps to provide the assurance required by 42 U.S.C. [§] 9604(c)(9);

(9) The constant influx of large volumes of hazardous wastes entering this state over and through congested state, county, and municipal highways and roads, coupled with the ever-increasing potential for traffic accidents and mishaps involving hazardous waste transporters, and the likelihood of leaks, spills, and/or explosions of said hazardous wastes resulting therefrom, altogether pose an unreasonable and unjustifiable risk to the health, safety, and welfare of Alabama's citizens;

(10) The State of Alabama lacks the financial resources and trained personnel necessary to cope with the serious dangers and risks associated with the transportation within this state of the ever-increasing volumes of hazardous wastes generated out of state, and, as a consequence, it can no longer adequately insure the safety and protection of its citizens from these hazards;

(11) While the use of landfills for the disposal of hazardous wastes is presently an approved method of hazard[ous] waste management, the federal and state governments are implementing phased bans on land disposal and CERCLA describes the landfilling of wastes as the least desirable regulatory technology;

(12) The State of Alabama has a genuine and significant interest in protecting its citizens and its environment from the unencumbered influx of hazardous waste generated in states which do not responsibly provide for the treatment, storage, and disposal of hazardous wastes within their own borders or which refuse to enter into an interstate or regional agreement to share the responsibilities of safe and effective hazardous waste management as required by CERCLA, as amended;

(13) The State of Alabama is compelled by the actions of other states which refuse to responsibly pro-

vide for hazardous waste treatment, storage, and disposal within their own borders or fail to cooperate in an interstate or regional plan for hazardous waste management, to enact legislation establishing a comprehensive waste management program in compliance with CERCLA, and which safeguards against the irresponsibility of other states which do not have adequate hazardous waste management programs by prohibiting the treatment, storage, or disposal of hazardous waste in Alabama which are generated in a state which does not allow hazardous waste treatment or disposal facilities within that state or which has not entered into an interstate or regional agreement to assure availability of hazardous waste treatment or disposal facilities.

(14) The imposition of the requirements contained in this legislation will encourage the development of new waste disposal facilities in other states in accord with the intentions of the Congress in enacting Section 42 U.S.S. § 9604(c)(9), and will have the beneficial effect of reducing, in an orderly manner, the nation's dependence on landfilling as a methodology for disposing of hazardous wastes.

Section 2. *Code of Alabama,* 1975 as amended, § 22-30-11, is hereby amended as follows:

§ 22-30-11(a) The department acting through the commission, is authorized to promulgate, and may revise when appropriate, rules and regulations, guidelines, criteria and standards for all hazardous waste management practices.

(b) *It is unlawful for any person who owns or operates a commercial hazardous waste treatment or disposal facility within this state to dispose or treat any hazardous wastes generated in any state outside the State of Alabama which:*

(i) prohibits by law or regulation the treatment or disposal of hazardous wastes within that state and which has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; or

(ii) has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; unless that state has entered into an interstate or regional agreement for the safe disposal of hazardous wastes pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act. The department shall establish and maintain a list of states from which hazardous wastes cannot be accepted for treatment or disposal pursuant to this paragraph and there shall be no liability under the paragraph for disposal of wastes from a state until fifteen (15) days after a state has been listed by the Department. Such list shall be publicly available and set forth the reasons why each state is listed. The date on which a state is included on such list shall be provided. The list of states shall be revised monthly. The state of generation as shown on the hazardous waste manifest shall be used in determining whether a person has treated or disposed of waste in violation of this subsection, and any person who alters the state of generation on any manifest or misrepresents the state of generation of any hazardous waste for the purpose of circumventing this statute shall be punishable in accordance with Section 22-30-19 herein.

(c) Subsequent to the effective date of this Act, no commercial hazardous waste treatment or disposal facility operating in this state may contract with states other than the State of Alabama in order to satisfy the capacity assurance programs required by 42 U.S.C. § 9604(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended."

(d) For the purpose of this section, the following additional terms are defined:

(1) AGREEMENT. Any interstate or regional contract agreement made pursuant to capacity assurance requirements of Section 42 U.S.C. § 9604 (c)(9) of CERCLA and which one of the signatories to such contract or agreement is the State of Alabama.

(2) COMMERCIAL HAZARDOUS WASTE TREATMENT OR DISPOSAL FACILITY. A facility which receives for disposal only, or for treatment and disposal, hazardous wastes that are not generated on-site and to which

facility a fee is paid or other consideration given for such treatment or disposal.

. . . .

(4) REGION(AL). Region(al) shall mean any or all of the following states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

(5) STATE OF GENERATION. A state of the United States in which the hazardous waste is generated in the form in which it is received by a commercial hazardous waste treatment or disposal facility located in Alabama for treatment or disposal.

Pursuant to the enactment of the Holley Bill,[8] in September 1989, Alabama banned importation of shipments of hazardous waste which had originated in states which have laws or regulations prohibiting the treatment or disposal of hazardous waste within their states and which have no facility permitted or existing within that state for the treatment or disposal of hazardous waste or which have not entered into an CERCLA agreement with Alabama. Although the ban prohibited importation of hazardous waste from some 22 states and the District of Columbia, it, nevertheless, affected less than three-tenths of one percent of the waste previously disposed of in Alabama.

Plaintiffs contend the Holley Bill is violative of the Constitution because it places restrictions on waste moving in interstate commerce. U.S. Const. art. I, section 8. In order to withstand this attack the state statute must require a legitimate local public interest in the regulation. Anderson, 78 Wis.L.Rev. at 707. Plaintiffs rely on the holding in *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475

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[8]The Holley Bill was passed by the Alabama House April 26, 1989, and by the Alabama Senate on May 4, 1989. Governor Guy Hunt signed the bill May 11, 1989. Except for Section 2(c) which became effective immediately upon enactment, the act became effective 120 days after its passage.

(1978), in which the court struck down a New Jersey statute prohibiting the importation of most solid or liquid waste which originated or was collected outside the territorial limits of the state as violative of the commerce clause. The court reviewed the statute in light of passage of RCRA. The court found that state law had not been preempted by the federal legislation. It concluded that there was no "general incompatibility [between the New Jersey statute and] basic federal objectives." *Id.* 98 S.Ct. at 2534 n. 4, 57 L.Ed.2d at 480 n. 4. The court scrutinized the statute to determine whether it was basically a protectionist measure or a law directed toward legitimate local concerns which affect interstate commerce. The New Jersey Supreme Court interpreted the statute to be protective of the state's environment, not her economy, and that its substantial benefits outweighed the burden on interstate commerce. The Supreme Court found that whatever the legislative purpose it was not relevant to the constitutional issue if the statute discriminated against interstate commerce, "unless there is some reason, apart from their origin, to treat them [out of state waste] differently." *Id.* 98 S.Ct. at 2537, 57 L.Ed.2d at 483. The court held the New Jersey statute violated the commerce clause. New Jersey was not allowed to isolate herself from the national economy or accord her own citizens preferential access to natural resources located within its borders. *City of Philadelphia* held a state may not impose restrictions on interstate commerce when those restrictions impose on out-of-state commercial interests the full burden of conserving the state's natural resources.[9] "What is crucial is the attempt by one State to isolate itself from a problem common to many be erecting a barrier against the movement of interstate trade." *Id.*, 98 S.Ct. at 2537, 57 L.Ed.2d at 484.

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[9]The Court in *City of Philadelphia* noted that it was expressing no opinion about New Jersey's power, consistent with the commerce clause, "to restrict to state residents access to state-owned resources . . . or . . . to spend state funds solely on behalf of state residents and businesses." 98 S.Ct. at 2537 n. 6, 57 L.Ed.2d at 484 n. 6.

> The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other.

Id. 98 S.Ct. at 2538, 57 L.Ed.2d at 485.

Since *City of Philadelphia* there have been other challenges brought under the commerce clause. *Harvey & Harvey v. Delaware Solid Waste Authority,* 600 F.Supp. 1369 (D.Del.1985), was an equal protection and commerce clause challenge to regulations adopted by the Solid Waste Authority. The plaintiffs alleged the purpose of the act and the regulations drew a distinction between solid waste depending on its geographic origin. The act halted the flow of solid waste generated in other states. Plaintiffs referred to the ruling in *City of Philadelphia* which had held solid waste constituted an item of constituted an item of interstate commerce. The court opined that the rule was not woodenly applied and "is directed only to state regulation whose primary effect is to confer a significant benefit on in-state economic interests or to impose a significant burden on out-of-state economic interests. Accordingly, the question is not merely whether a distinction is drawn but whether there is significant discrimination against out-of-state economic interests." 600 F.Supp. at 1380.

The court distinguished *Harvey* from *City of Philadelphia* by saying that New Jersey prohibited all solid waste, in effect imposing on out-of-state interests the full impact of conserving the natural resources of New Jersey. *Id.* The *Harvey* court concluded the state regulation, purportedly directed toward state health and environment, did not materially favor in-state economic interest in spite of the incidental impact on interstate commerce.

In *J. Filiberto Sanitation, Inc. v. Dept. of Environmental Protection,* 857 F.2d 913 (3d Cir. 1988), a solid waste hauler brought action seeking declaratory and injunctive relief with respect to a rule under the New Jersey Solid Waste Management Act which required deposit of waste collected in county at a trans-

fer station for processing and subsequent disposal. The court felt that if the rule were genuinely aimed at the goal of alleviating the trash crisis, and sought to achieve that goal without transferring the burden of the solution to out-of-state interests, it was subject to the balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Under *Pike*, the rule would be invalid only if the incidental burden on interstate commerce is excessive in relation to the local benefits. 857 F.2d at 919.

Lefrancois v. State of Rhode Island, 669 F.Supp. 1204 (D.R.I. 1987) also distinguished *City of Philadelphia*. The court devoted a section to a discussion of the commerce clause. "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes. . . ."U.S. Const. art. I, § 8. The interpretation restricting state regulation is referred to as the "dormant" commerce clause. The Supreme Court has developed a two part dormant clause analysis.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 1207 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (citations omitted).

Lefrancois concluded that whatever the purpose of the statute was that it could not be accomplished by discriminating against articles from out of the state on the basis of their origin unless there was some reason to treat them differently. The court concluded that the statute had the effect of closing the Rhode Island borders to out-of-state waste.

In *Hyatt Corp. v. Hyatt Legal Services*, 610 F.Supp. 381 (N.D.Ill. 1985), the court discussed the balancing test of *Pike*. In discussing the number of factors involved the court said:

> Most important is the actual effect on interstate commerce. The legitimacy of the local concern, however, is also an important factor. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. [27] at 36, 100 S.Ct. [2009] at 2015 [64 L.Ed.2d 702 (1980)]. Statutes designed to protect health and welfare are more favored than statutes designed to protect employment and profits.

Id. at 384.

Norfolk Southern Corp. v. Oberly, 632 F.Supp. 1225 (D.Del. 1986), *aff'd*, 822 F.2d 388 (3d Cir. 1987), addressed the issue of whether Delaware could enforce the Delaware Coastal Zone Act challenged by proponents of a coal transferring facility in Delaware Bay. Under Commerce Clause standards the court enunciated the "test that forms the touchstone in Commerce Clause analysis," as set by the Supreme Court in *Pike:*

> [W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . .If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 1232.

In *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980), the court held that South Dakota's policy, during periods of cement shortage, of confining sales of state-produced cement to South Dakota residents, was not violative of commerce clause (art. I, § 8, cl 3).

Not only must the court scrutinize the Holley Bill for commerce clause violations, it must determine whether the federal law has preempted the field. In *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984), the court set forth the principles guiding preemption of state laws, set forth below:

> Under the Supremacy Clause, US Const, Art VI, cl 2, the enforcement of a state regulation may be pre-empted by federal law in several circumstances: first, when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 US 519, 525, 51 L Ed. 2d 604, 97 S Ct 1305 [1309] (1977); second, when it is clear, despite the absence of explicit pre-emptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has thereby "left no room for the States to supplement" federal law, *Rice v. Sante Fe Elevator Corp.*, 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 [1152] (1947); and, finally, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132, 142-143, 10 L Ed 2d 248, 83 S Ct 1210 [1217-1218] (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 US 52, 67, 85 L Ed 581, 61 S Ct 399 [404] (1941).

Id. 467 U.S. at 698-99, 104 S.Ct. at 2699-2700, 81 L.Ed.2d at 588-89.

Analogous to the situation before the court is the decision reached by the Supreme Court in *Hillsborough County, Fla. v. Automated Medical Laboratories*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), in which the court held that Federal blood plasma regulations did not preempt county ordinances imposing requirements beyond those contained in federal regulations.

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 10 L.Ed.2d 248, 83 S.Ct. 1210 [1217-1218] (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz,* [312 U.S. 52] supra, at 67, 85 L.Ed. 581, 61 S.Ct. 399 [404]. See generally *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 698-699, 81 L.Ed.2d 580, 104, S.Ct. 2694 [2699-2700] (1984).

471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d at 721.

> The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme. See supra, [471 U.S.] at 712-713 [105 S.Ct. at 2374-2375], 85 L.Ed.2d at 720-721. In this case, appellee concedes that neither Congress nor the FDA expressly preempted state and local regulation of plasmapheresis.

471 U.S. at 714, 105 S.Ct. at 2375, 85 L.Ed.2d at 722.

The FDA possesses the authority to promulgate regulations under this legislation. *Hillsborough* held that the court's analysis would be different had Congress not delegated to the FDA the administration of the federal program. 471 U.S. at 721, 105 S.Ct. at 2379, 85 L.Ed.2d at 726.

This was followed the next year by *Ensco, Inc. v. Dumas,* 807 F.2d 743 (8th Cir. 1986), in which a waste disposal company challenged an ordinance prohibiting storage, treatment, or disposal of hazardous waste. The court concluded:

> We agree with the County that the language in section 6929 prevents a conclusion that Congress through the RCRA preempted all state and local

> regulation of hazardous waste disposal. *Cf. Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 105 S.Ct. 2371, 2375-76, 85 L.Ed.2d 714 (1985) (agency in issuing regulations under Public Health Service Act had declared that state and local authority was not intended to be preempted); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620-21 n. 4, 98 S.Ct. 2531, 2533-34 n. 4, 57 L.Ed.2d 475 (1978) (no clear congressional intent in RCRA to preempt entire field of interstate waste management or transportation). Even where concurrent regulation is not totally precluded, however, state and local enactments are nullified to the extent they actually conflict with federal law. *Hillsborough County*, 105 S.Ct. at 2375. A conflict exists when the local enactment " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).
>
> . . .
>
> The RCRA emphasizes the need for safe disposal and treatment of hazardous waste and grants to the EPA the authority to develop and detail appropriate waste procedures and to outlaw less healthful practices.

Id. at 744-45.

The legislative history of environmental law indicates Congress intended to build a program to protect the environment and the health and welfare of the citizenry without preempting earlier acts and without preempting the states in the field of environmental protection. While state are required to comply with minimum restrictions, no language prevents them from requiring more stringent standards.

[1] Having scrutinized the Alabama statute, the court is of the opinion that the law is directed toward a legitimate state concern: an effort to comply with the 20 year CERCLA capacity assurance directive and more importantly to assure that all hazardous waste buried in Alabama is treated and disposed of

in the most environmentally protective manner, as is the hazardous waste generated in-state.[10] It is not an effort to isolate Alabama from the national economy. Alabama's statute does not close its borders to all out-of-state waste, only to out-of-state waste from states that are not in compliance with federal law. As soon as they are in compliance the borders will be opened to them.

Nor is the court of the opinion that the effect of the Holley Bill confers a "significant benefit on in-state economic interests" or imposes "a significant burden on out-of-state economic interest." (*Harvey* interpretation of *City of Philadelphia* previously discussed). The court holds there is not significant discrimination against out-of-state economic interests sufficient to warrant striking the Holly Bill as unconstitutional.

Alabama's act, unlike the New Jersey one heard by the court in *City of Philadelphia,* does not prohibit importation of all solid waste. It does not have the effect of closing its borders to all out-of-state waste. The ban is directed toward protection of the health and welfare of the people and preservation of the environment while encouraging compliance with federal legislation. Its aim is to prevent Alabama from becoming the dumping ground for those states that refuse to "clean up their act" under federal law. Its impact on interstate commerce is incidental and not excessive in relation to the local benefits. (*Pike; Lefrancois.*)

Nor is the Alabama statute an effort to preserve a natural resource, its landfill, at the expense of the rest of the nation. It is not an effort to hoard natural resources by denying entry of nonconforming, out-of-state waste to its waste sites. It has not restricted access to those states that have complied with federal law. It has not forbidden either the passage of out-of-state waste across its borders or the deposit of such waste at

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[10]Hazardous waste generated in Alabama is regulated by the Hazardous Waste Management and Minimization Act. Regulations and guidelines for the treatment, storage, and disposal of all hazardous wastes generated in the state are continually evaluated and updated.

the Emelle landfill except for waste coming from nonconforming states. The competitive plight of the plaintiffs in the above-styled action cannot be laid at the feet of Alabama. It is attributable to the nonconforming states for not passing necessary legislation or otherwise cooperating toward solution of the problem. *See Waste Aid Systems, Inc. v. Citrus County, Florida,* 613 F.Supp. 102 (D.C.Fla. 1985) (The county ban against acceptance of out-of-county waste at county's solid waste disposal landfill did not result in a "hoarding" of a natural resource, where county neither refused access to all its landfills nor forbade transportation of out-of-county waste through its borders). In the primary case relied upon by the plaintiffs *Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978), hoarding occurred when the defendant state forbade entry of waste generated outside the state, thus closing "its borders to all waste from other States." 437 U.S. at 619, 98 S.Ct. at 2533. Alabama has not closed its borders to all waste from other states, but has only limited its available landfills to those states that are cooperating in an effort to control the environment and protect the health and safety of citizens of all states pursuant to Congress's plan. The landfills are, therefore, not hoarded.

For the above stated reasons the court holds that Act No. 89-788, Code of Alabama 1975, § 22-30-11(b), the Holley Bill, does not violate the commerce clause of the Constitution.

[2] Neither does the Holley Bill violate the supremacy clause of the Constitution. None of the environmental legislation enacted expresses a clear intent to preempt state law. Case law and legislative history indicate there was no such intent. Absent any intention to preempt the field, and there being no conflict between the Alabama statute and federal legislation which would make compliance with both a physical impossibility, the court hold that the Alabama statute does not violate the supremacy clause of the Constitution.

Neighboring state have long benefited from Alabama's foresight and industry in developing means for hazardous waste disposal and its minimization. To allow them to con-

tinue to avail themselves of waste sites in Alabama when they have done nothing toward implementation of the federal policies herein discussed would defeat the very intent of the federal legislation. To hold that either the commerce clause or the supremacy clause of the Constitution mandates Alabama's borders be opened to all threatens the future fashioning of effective and creative programs for cleaning up hazardous waste sites and providing for the safest means of disposal. Unless those nonconforming states are forced to comply with federal legislation, they will continue to do the locally popular thing: transport the waste to Alabama or other conforming states.

For the reasons set forth in this opinion, the court grants summary judgment in favor of the defendants. An order consistent with the opinion is being entered contemporaneously herewith.

FINAL ORDER

This cause comes before the court on the motion for preliminary injunction which this court converted into simultaneous motions for summary judgment ex mero motu at the October 16, 1989, preliminary injunction hearing. Having considered the motions, the pleadings, the submissions and arguments of counsel, and the applicable law, the court is of the opinion that Act No. 89-788, *Ala.Code* § 22-30-11(b) (1975) [the Holley Bill], is constitutional. It is of the further opinion that judgment is due all defendants as a matter of law, there being no just reason for delay in entering a final judgment. Accordingly, in conformity with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the motion of the defendants for summary judgment be and it hereby is GRANTED. It is

FURTHER ORDERED, ADJUDGED and DECREED that Act No. 89-788, *Ala. Code* § 22-30-11(b) (1975) [the Holley

Bill], and the ensuing LDR regulations and emergency regulations be and they hereby are DECLARED constitutional. It is

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiffs' motion for summary judgment be and it hereby is DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that issuance of a permanent injunction enjoining defendants from enforcing, applying, or attempting to enforce the Holley Bill, the LDR regulations and the emergency regulations be and it hereby is DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the defendants, and the plaintiffs shall have and recover nothing of the defendants in this action.

DONE and ORDERED.

APPENDIX D

ACTS OF ALABAMA

Act No. 89-788

May 11, 1989

AN ACT

To amend Code of Alabama, 1975, §22-30-11, to provide for additional definitions and to prohibit commercial hazardous waste treatment or disposal facilities from accepting hazardous wastes generated in another state which prohibits the treatment, storage, or disposal of hazardous wastes within its own borders, or which refuses to or fails to comply with 42 U.S.C. §9604(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as ammended, which requires each state to adequately treat and dispose of all hazardous wastes reasonably expected to be generated within that state over the next 20 years through the establishment of a hazardous waste treatment or disposal facility within the state or through the use of a hazardous waste treatment or disposal facility located outside the state in accordance with an interstate agreement or regional agreement or authority.

Be It Enacted by the Legislature of Alabama:

Section 1. The legislature finds that:

(1) The generation, management, and disposal of hazardous wastes is a cause of continuing concern to the citizens of this state;

(2) The State of Alabama has a responsibility to protect the public health, welfare, and safety of its citizens by and through the enactment of laws designed to protect and preserve the environment from the health risks and endangerments associated with the treatment and disposal of hazardous wastes;

(3) The United States Congress, recognizing the serious health threats and risks posed by the treatment and disposal

of hazardous wastes to public health and the environment, enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. 9604(c)(9), as amended, with requires that each state demonstrate by October 17, 1989, that is has adequate capacity to treat, destroy, or secure disposition of all hazardous wastes reasonably expected to be generated within the state over the next 20 years through the establishment of a hazardous waste treatment or disposal facility located within its borders, or through the use of a hazardous waste treatment or disposal facility located outside the state in accordance with an interstate agreement or regional agreement or authority;

(4) In enacting the capacity assurance requirements, Congress recognized that local pressures have impeded the siting of new hazardous waste treatment and disposal facilities in the nation in the past several years, and that if the federal Resource Conservation and Recovery Act as amended ("RCRA") and CERCLA are to work properly, such additional sites must be made available. Since Alabama is already bearing far more than its fair share of the burden of managing hazardous wastes, it is only equitable that new capacity be developed in other states which have failed to assume their own obligations to site such facilities.

(5) Both Congress and the U.S. Environmental Protection Agency have recognized that the capacity assurance provisions of CERCLA would be used to force the development of new capacity to manage hazardous wastes. Implicit in the CERCLA capacity-assurance procedure is a recognition that an importing state might refuse to enter into an agreement with an exporting state, requiring the exporting state to create available capacity through waste reduction or through siting new facilities, or enter into an agreement with another state to manage these wastes;

(6) The State of Alabama has enacted and implemented an approved program for the handling and disposal of hazardous

wastes within its borders, known as the "Hazardous Wastes Management and Minimization Act," and has established regulations and guidelines for the treatment, storage and disposal of all hazardous wastes generated within the state, and continues to evaluate and update those regulations and guidelines;

(7) The State of Alabama, since 1978, has had an adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the state over the next 20 years through the establishment and continued existence of commercial hazardous waste facilities within the state;

(8) The State of Alabama has, since 1978, accepted for treatment and disposal, disproportionate amounts of hazardous wastes generated within the borders of other states which have not taken steps to provide the assurance required by 42 U.S.C. 9604(c)(9);

(9) The constant influx of large volumes of hazardous wastes entering this state over and through congested state, county, and municipal highways and roads, coupled with the ever-increasing potential for traffic accidents and mishaps involving hazardous waste transporters, and the likelihood of leaks, spills, and/or explosions of said hazardous wastes resulting therefrom, altogether pose an unreasonable and unjustifiable risk to the health, safety, and welfare of Alabama's citizens;

(10) The State of Alabama lacks the financial resources and trained personnel necessary to cope with the serious dangers and risks associated with the transportation within this state of the ever-increasing volumes of hazardous wastes generated out of state, and, as a consequence, it can no longer adequately insure the safety and protection of its citizens from these hazards;

(11) While the use of landfills for the disposal of hazardous wastes is presently an approved method of hazard waste man-

agement, the federal and state governments are implementing phased bans on land disposal and CERCLA describes the landfilling of wastes as the least desirable regulatory technology;

(12) The State of Alabama has a genuine and significant interest in protecting its citizens and its environment from the unemcumbered influx of hazardous waste generated in states which do not responsibly provide for the treatment, storage, and disposal of hazardous wastes within their own borders or which refuse to enter into an interstate or regional agreement to share the responsibilities of safe and effective hazardous waste management as required by CERCLA, as amended;

(13) The State of Alabama is compelled by the actions of other states which refuse to responsibly provide for hazardous waste treatment, storage, and disposal within their own borders or fail to cooperate in an interstate or regional plan for hazardous waste management, to enact legislation establishing a comprehensive waste management program in compliance with CERCLA, and which safeguards against the irresponsibility of other states which do not have adequate hazardous waste management programs by prohibiting the treatment, storage, or disposal of hazardous waste in Alabama which are generated in a state which does not allow hazardous waste treatment or disposal facilities within that state or which has not entered into an interstate or regional agreement to assure availability of hazardous waste treatment or disposal facilities.

(14) The imposition of the requirements contained in this legislation will encourage the development of new waste disposal facilities in other states in accord with the intentions of the Congress in enacting Section 42 U.S.C. § 9604(c)(9), and will have the beneficial effect of reducing, in an orderly manner, the nation's dependence on landfilling as a methodology for disposing of hazardous wastes.

Section 2. Code of Alabama, 1975, as amended, §22-30-11, is hereby amended as follows:

§22-30-11(a) The department acting through the commission, is authorized to promulgate, and may revise when appropriate, rules and regulations, guidelines, criteria and standards for all hazardous waste management practices.

(b) It is unlawful for any person who owns or operates a commercial hazardous waste treatment or disposal facility within this state to dispose or treat any hazardous wastes generated in any state outside the State of Alabama which:

(i) prohibits by law or regulation the treatment or disposal of hazardous wastes within that state and which has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; or

(ii) has no facility permitted or existing within that state for the treatment or disposal of hazardous wastes; unless that state has entered into an interstate or regional agreement for the safe disposal of hazardous wastes pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act. The department shall establish and maintain a list of states from which hazardous wastes cannot be accepted for treatment or disposal pursuant to this paragraph and there shall be no liability under the paragraph for disposal of wastes from a state until fifteen (15) days after a state has been listed by the Department. Such list shall be publicly available and set forth the reasons why each state is listed. The date on which a state is included on such list shall be provided. The list of states shall be revised monthly. The state of generation as shown on the hazardous waste manifest shall be used in determining whether a person has treated or disposed of waste in violation of this subsection, and any person who alters the state of generation on any manifest or misrepresents the state of generation of any hazardous waste for the purpose of circumventing this statue shall be punishable in accordance with Section 22-30-19 herein.

(c) Subsequent to the effective date of this Act, no commercial hazardous waste treatment or disposal facility operating in this state may contract with states other than the State of Alabama in order to satisfy the capacity assurance programs required by 42 U S.C. § 9604(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended."

(d) For the purpose of this section, the following additional terms are defined:

(1) AGREEMENT. Any interstate or regional contract or agreement made pursuant to capacity assurance requirements of Section 42 U.S.C. § 9604(c)(9) of CERCLA and which one of the signatories to such contract or agreement is the State of Alabama.

(2) COMMERCIAL HAZARDOUS WASTE TREATMENT OR DISPOSAL FACILITY. A facility which receives for disposal only, or for treatment and disposal, hazardous wastes that are not generated on-site and to which facility a fee is paid or other consideration given for such treatment or disposal.

(3) OPERATOR. The person responsible for overall operations of a commercial hazardous waste treatment or disposal facility.

(4) REGION(AL). Region(al) shall mean any or all of the following states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

(5) STATE OF GENERATION. A state of the United States in which the hazardous waste is generated in the form in which it is received by a commercial hazardous waste treatment or disposal facility located in Alabama for treatment or disposal.

Section 3. The provisions of this act are cumulative and shall not be deemed to repeal existing laws.

Section 4. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional, such declaration shall not affect the part that remains.

Section 5. This act shall become effective one hundred twenty (120) days after its passage and approval by the Governor, or upon its otherwise becoming a law except that Section 2(c) shall become effective immediately upon this Act becoming law.

Approved May 11, 1989

Time: 6:15 P.M.

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

No. 90-1718

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ET AL., PETITIONERS

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AND CHEMICAL WASTE MANAGEMENT, INC., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Ala. Code § 22-30-11(b), which expressly prohibits the disposal within Alabama of hazardous waste generated in other States that fail to comply with criteria specified by Alabama—and which Alabama has interpreted to bar disposal of hazardous waste generated in 22 States and the District of Columbia—violates the Commerce Clause.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent Chemical Waste Management, Inc., states that its parent corporation is Waste Management, Inc. Chemical Waste Management, Inc.'s subsidiaries (other than wholly owned subsidiaries) are The Brand Companies, Inc.; General Nuclear Systems, Inc.; Cemtech Management, Inc.; and Cemtech LP.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 910 F.2d 713 and the opinion of the court of appeals modifying its opinion and denying the petition for rehearing (Pet. App. A23-A29) is reported at 924 F.2d 1001. The opinion of the district court (Pet. App. A30-A56) is reported at 729 F. Supp. 792.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1990. A petition for rehearing was denied on February 7, 1991. The petition for a writ of certiorari was filed on May 7, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Regulatory Background

Disposal of hazardous waste is strictly regulated under federal law. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, and the regulations promulgated by the Environmental Protection Agency pursuant to that statute (see 40 C.F.R. Parts 260-271), impose elaborate requirements for the safe handling and disposal of hazardous waste. "The RCRA establishes a framework for regulating the storage and disposal of hazardous wastes in general. * * * * The regulations promulgated pursuant to the RCRA ensure that facilities disposing of hazardous wastes do so in a manner consistent with eliminating health and environmental risks caused by the hazardous wastes." *Alabama* v. *United States Environmental Protection Agency*, 871 F.2d 1548, 1552 (11th Cir.), cert. denied, 110 S.Ct. 538 (1989) (citations omitted). RCRA provides that all operators of hazardous waste treatment, storage, or disposal facilities must obtain permits fixing the terms on which the operator may engage in those activities. 42 U.S.C. § 6925.[1]

Federal law recognizes that, for the foreseeable future, some hazardous waste must be disposed of in landfills. Congress in 1984 specified that land dis-

[1] Petitioners advert throughout the petition to the dangers associated with hazardous waste. They ignore the fact that federal and state regulatory requirements minimize to a substantial degree any threat to public health or the environment. When such waste is properly managed pursuant to the applicable federal and state regulations, any health hazard is minimal. *Alabama* v. *United States Environmental Protection Agency*, 871 F.2d at 1552-1553.

posal of hazardous waste would be permitted only after such waste is treated with the "best available demonstrated technology" in order to reduce the waste's toxicity and mobility. 42 U.S.C. § 6924. The EPA has promulgated regulations setting forth these technological requirements. Those regulations make clear that land disposal—after pretreatment—remains the only feasible means of disposal for some types of hazardous waste. See generally 40 C.F.R. Part 268.

Acknowledging the continued need for hazardous waste disposal sites, Congress has sought to stimulate expansion of the Nation's disposal capacity by encouraging development of new disposal sites. Congress concluded in 1986 that local political pressures —the so-called "not in my backyard" syndrome—had blocked creation of new facilities. It therefore added Section 104(c)(9) to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9604(c)(9), which provides States with an incentive to authorize the siting of new disposal facilities. That statute required each State to provide to the EPA—by October 17, 1989—assurances showing that the State will have adequate capacity (either within the State or outside the State in accordance with an interstate or regional agreement) to dispose of hazardous waste generated within the State over the next 20 years. If a State fails to provide such assurances, or the State's assurances are deemed inadequate by the EPA, federal Superfund monies for long-term remediation of unsafe hazardous waste sites may not be spent within that State. See also Pet. App. A3-A5.[2]

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[2] Section 104(c)(9) does not direct that waste generated within a State be disposed of at the disposal facilities refer-

B. The Challenged Statute

Respondent Chemical Waste Management, Inc. (CWM), owns and operates a commercial hazardous waste disposal facility located near the town of Emelle, Alabama (the "Emelle facility"). That facility has received a RCRA permit from the EPA, as well as a separate permit—issued by the EPA pursuant to the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.*—authorizing the disposal of polychlorinated biphenyls (PCBs). These permits establish that the Emelle facility "has complied with elaborate federal regulations designed to ensure the safe disposal of hazardous wastes * * *. To the extent these federal regulations can and do provide for the safe treatment and disposal of toxic wastes, CWM's Emelle, Alabama, facility poses no threat to the health and safety of the residents of Emelle or to other Alabama residents." *Alabama* v. *United*

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enced in that State's capacity assurance plan. Pet. App. A14 (holding by the court below that in Section 104(c)(9) "Congress has not, in our opinion, authorized Alabama to restrict the free movement of hazardous waste across Alabama's borders"). As the United States explained in its *amicus* brief in the court of appeals filed in support of respondents (at 9),

> the capacity assurance program is aimed at creating adequate capacity nationwide to provide for the disposal of hazardous wastes expected to be generated during the next twenty years. With adequate capacity in place, generators and disposers of hazardous wastes can choose between the alternative facilities available for the actual disposal of wastes based on market conditions. The capacity assurance program is not designed to dictate where each state's hazardous waste will actually be deposited. It is designed to ensure sufficient overall national capacity within which a national market may work effectively.

States Environmental Protection Agency, 871 F.2d at 1552-1553.[3] Before the statute challenged in this case took effect, waste generated in almost every State moved in interstate commerce for disposal at the Emelle facility. Pet. App. A2.

In 1989, the Alabama Legislature enacted—and the Governor signed into law—Ala. Act No. 89-788 (codified at Ala. Code § 22-30-11(b)), popularly known as the "Holley Bill."[4] That measure bars any commercial hazardous waste disposal facility located in Alabama (only the Emelle facility meets this definition) from treating or disposing of hazardous waste generated outside Alabama if the State in which the waste was generated either (1) prohibits the treatment or disposal of hazardous waste within its borders and has no hazardous waste treatment and disposal facility; or (2) has no facility within the State for the treatment or disposal of hazardous waste and has not entered into an interstate or regional waste disposal agreement to which Alabama is a signatory. The statute also prohibits commercial waste management facilities in Alabama from contracting with any State other than Alabama to satisfy that State's federal capacity assurance obligation.[5]

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[3] The Emelle facility also is regulated under Alabama law. Currently, the facility is authorized to operate pursuant to the interim status procedures set forth in Ala. Code § 22-30-12(i).

[4] Representative Holley was the author of the statute.

[5] The Holley Bill is not Alabama's only attempt to prevent the disposal within Alabama of hazardous waste generated in other States. In 1988, Alabama state officials sought to halt the cleanup of an abandoned hazardous waste site in Texas

Defendants have concluded that 22 States and the District of Columbia do not satisfy the conditions set forth in the Holley Bill. They have therefore prohibited the Emelle facility from accepting for disposal any waste generated in those States. Waste from 17 of those States was formerly transported in interstate commerce for disposal at the Emelle facility. Pet. App. A7.

C. The Decisions Below

CWM and the National Solid Wastes Management Association, a trade association whose members are engaged in the interstate transportation and disposal of hazardous waste in Alabama and other States, instituted this action in the United States District Court for the Northern District of Alabama challenging the constitutionality of the Holley Bill.[6] The dis-

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because the waste was to be disposed of at the Emelle facility. That effort was unsuccessful. *Alabama* v. *United States Environmental Protection Agency, supra.* In 1990, Alabama adopted a discriminatory $72 per ton fee on the disposal within Alabama of waste generated in other States (the fee did not apply to the disposal of waste generated in Alabama). That fee was held invalid under the Commerce Clause. *Chemical Waste Management, Inc.* v. *Alabama Dep't of Revenue,* No. CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal pending, No. 190-1043 (Ala. Sup. Ct.).

[6] The complaint also challenged the constitutionality of two sets of regulations issued by the Alabama Department of Environmental Management. The court of appeals held one set of regulations preempted by federal law and remanded the case to the district court for further proceedings on respondents' Commerce Clause challenge to the other set of regulations. Pet. App. A15-A23, A24-A29. The certiorari petition does not present any question concerning the court of appeals' ruling with respect to these measures. See Pet. 5 n.1.

trict court held the statute constitutional. Pet. App. A30-A56. The court concluded that "there is not significant discrimination against out-of-state economic interests sufficient to warrant striking the Holley Bill as unconstitutional." *Id.* at A53. Applying the test applicable to statutes that do not discriminate against interstate commerce set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), the court concluded that the Holley Bill's "impact on interstate commerce is incidental and not excessive in relation to the local benefits." Pet. App. A53.

The court of appeals unanimously reversed. Pet. App. A1-A22. It first held that hazardous waste is an object of commerce protected under the Commerce Clause. *Id.* at A8-A10. The court next determined that the Holley Bill unlawfully discriminates against interstate commerce in violation of the Commerce Clause. Relying on this Court's conclusion in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 626-627 (1978), that a legitimate state purpose "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently," the court of appeals held that "[t]he Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction" (Pet. App. A12). The court observed that "[o]n its face, the Holley Bill discriminates against out-of-state generators and imposes on these generators the burden of conserving Alabama's remaining hazardous waste disposal capacity." *Id.* at A12. It therefore concluded that the statute violated the Commerce Clause.[7]

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[7] The court of appeals subsequently denied petitioners' petition for rehearing and suggestion for rehearing en banc

ARGUMENT

This Court held in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), that New Jersey's ban on the disposal within its borders of waste generated in other States violated the Commerce Clause. The decision below correctly applies the principles announced in *City of Philadelphia*, which have been followed consistently by the lower courts to invalidate statutes that expressly discriminate against waste generated in other States. Indeed, petitioners' inability to cite any conflicting authority highlights the settled nature of this area of the law. This case simply does not present an important legal issue warranting this Court's attention. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That The Holley Bill Violates The Commerce Clause.

The court of appeals correctly concluded that Alabama's ban on the disposal within its borders of hazardous waste generated in numerous other States discriminates against interstate commerce in violation of the Commerce Clause. Indeed, that determination rests on long-settled principles firmly rooted in this Court's Commerce Clause jurisprudence.

1. *Hazardous Waste Is An Article Of Commerce Protected By The Commerce Clause.*

Petitioners assert (Pet. 17-20) that the protections of the Commerce Clause do not extend to hazardous waste that moves in interstate commerce. That con-

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(Pet. App. A24-A29), modifying its original opinion with respect to the Alabama regulations that are not at issue here (see note 6, *supra*).

tention is foreclosed by this Court's decision in *City of Philadelphia.*

The lower court in *City of Philadelphia* had "questioned whether the interstate movement of * * * wastes * * * is 'commerce' at all within the meaning of the Commerce Clause," relying on "several old cases" in which this Court had upheld state statutes banning the importation of substances infected with germs that would " 'spread disease, pestilence, and death.' " 437 U.S. at 621, 622 (citation omitted). Stating that the lower court had "misread [this Court's] cases," this Court held that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *Id.* at 622.

This Court explained that the old cases relied on by the lower court in *City of Philadelphia* did not hold the Commerce Clause inapplicable to particular items of commerce, but were instead grounded in a determination that the state statutes did not violate the applicable Commerce Clause standard: "because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines." 437 U.S. at 622. This Court squarely "reject[ed] the [lower] court's suggestion that the banning of 'valueless' out-of-state wastes * * * implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." *Id.* at 622-623.

As the court of appeals held (Pet. App. A8-A9), this reasoning applies with equal force to haz-

ardous waste. Because hazardous waste plainly is an "object[] of interstate trade" and Congress clearly has the power to regulate the interstate movement of hazardous waste, "States are not free from constitutional scrutiny when they restrict that movement." *City of Philadelphia*, 437 U.S. at 622.[8]

2. *The Holley Bill Unlawfully Discriminates Against Interstate Commerce.*

There can be no doubt that the Holley Bill discriminates on its face against interstate commerce. The statute by its very terms applies only to waste generated "in any state outside the State of Alabama." Ala. Code § 22-30-11(b). And petitioners have interpreted the statute to bar the disposal within Alabama of waste from 22 States and the District of Columbia. That is the essence of discrimination against interstate commerce.

Petitioners suggest (Pet. 15, 17) that the Holley Bill is not discriminatory because it permits disposal within Alabama of waste generated in States that have satisfied a precondition that supposedly has been satisfied by Alabama. But this Court repeatedly has held that such reciprocity provisions—which condition equal treatment of products from other States on compliance with standards prescribed by the first State—discriminate against interstate commerce and must be measured by the strict scrutiny standard applicable to discriminatory state laws. *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273 (1988); *Sporhase* v. *Nebraska ex rel. Douglas*, 458

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[8] Petitioners' arguments rest on the alleged lack of "intrinsic value or usefulness" of hazardous waste (Pet. 19), but that is the very inquiry that this Court declined to undertake in *City of Philadelphia*.

U.S. 941, 958 (1982) (reciprocity requirement amounts to "facially discriminatory legislation"); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 378-379 (1976).

Facial discrimination against interstate commerce "by itself may be a fatal defect, regardless of the State's purpose." *Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979). To the extent it is not, the standard that a State must meet to carry this burden of justification is "high." *New Energy Co.*, 486 U.S. at 278; see also *Hughes* v. *Oklahoma*, 441 U.S. at 337 (the reviewing court must engage in "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives"). A discriminatory statute is invalid unless the State carries its burden of showing that the statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co.*, 486 U.S. at 278. The court of appeals correctly held that petitioners failed to carry that burden.

Petitioners repeatedly emphasize the purported dangers of hazardous waste disposal (Pet. 12-15, 18-19) and assert that the Holley Bill is justified on environmental protection and public health grounds (Pet. 15). As the court of appeals held, however, "[e]ven if Alabama's purpose in enacting the Holley Bill was to protect human health and the environment in Alabama, that purpose 'may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" Pet. App. A11-A12 (quoting *City of Philadelphia*, 437 U.S. at 626-627).

There is no dispute that "the types of wastes accepted at the Emelle facility did not vary based upon the states in which the wastes were generated. The Holley Bill plainly distinguishes among wastes based on their origin, with no other basis for the distinction." Pet. App. A12. The ban on out-of-state waste in *City of Philadelphia* could not be justified on environmental protection grounds because it did not apply evenhandedly to all waste disposed of in New Jersey but rather targeted only waste generated in other States. 437 U.S. at 626-628. So here, Alabama's partial ban on out-of-state waste may not be upheld on environmental protection grounds because it too discriminates against waste generated in other States.

Petitioners attempt (Pet. 15) to justify the Holley Bill on the ground that it is not a protectionist measure. That is simply wrong. As in *City of Philadelphia*, the statute here "imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." 437 U.S. at 628. The court of appeals properly "reject[ed] the district court's conclusion that, because Alabama closed its borders to only some states, Alabama is not hoarding its disposal capacity." Pet. App. A12. The Holley Bill burdens *only* out-of-state generators; no in-state generator is affected by the ban (Alabama has in addition exempted from that burden generators in States not subject to the ban). The effect of the statute unquestionably is to preserve disposal capacity at the Emelle facility for Alabama-generated and Alabama-approved waste by discriminating against interstate commerce. Moreover, Alabama has expressly banned a large component of interstate commerce. The fact that the Holley Bill discriminates against

some—rather than all—interstate commerce does not save the statute under the Commerce Clause. Rather, the Holley Bill's protectionist purpose and effect make clear that the statute is unconstitutional.

Petitioners also argue (Pet. 15) that the Holley Bill advances the legitimate local interest of promoting compliance by other States with the Section 104(c)(9) capacity assurance requirement.[9] To begin with, Congress itself provided a penalty for failure to comply with Section 104(c)(9)—loss of certain federal funds. See page 3, *supra*. Congress did not authorize the States to supplement that scheme with additional incentives or penalties. Promoting compliance with the federal obligation therefore is not a legitimate local interest. *Wisconsin Dep't of Industry, Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 291 (1986) (barring State from supplementing federal penalty scheme).[10]

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[9] Alabama does not—and could not—contend that the statute is necessary for its own compliance with Section 104(c)(9). See Pet. App. A11.

[10] Petitioners do not renew in this Court their contention that Congress in Section 104(c)(9) specifically authorized the States to adopt measures that discriminate against interstate commerce in hazardous waste. Applying the principle that such congressional authorization must be "unmistakably clear" (*South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984)), the court of appeals properly determined that "nothing in [Section 104(c)(9)] evidences congressional authorization for each state to close its borders to wastes generated in other states to force those other states to meet federally mandated hazardous waste management requirements." Pet. App. A14 (footnote omitted). See also *id.* at A14-A15 n.12 (comparing Section 104(c)(9) to a statute that expressly does authorize States—in certain specified circumstances—to discriminate against interstate commerce in radioactive waste).

This purported interest is illegitimate for the additional reason that the Commerce Clause bars States from trying to control out-of-state conduct. See, *e.g.*, *Healy* v. *Beer Institute, Inc.*, 109 S. Ct. 2491, 2499 (1989) ("the critical inquiry [under the Commerce Clause] is whether the practical effect of the [State] regulation is to control conduct beyond the boundaries of the State"). Far from justifying the discriminatory statute, petitioners' argument confirms the unconstitutionality of the Holley Bill because it makes clear that the statute was designed to affect out-of-state activity, not in-state activity.

Moreover, the Holley Bill cannot be upheld on this ground because it is inconsistent with Section 104 (c) (9). The federal statute permits a State to meet its capacity assurance requirement by entering into an agreement with any other State. But the Holley Bill forbids the disposal within Alabama of waste generated in States that choose to base their capacity assurances on interstate agreements with States other than Alabama. The Holley Bill thus penalizes generators located in States that in fact have satisfied Section 104(c) (9). This critical defect makes clear that the Holley Bill cannot be justified as a device for implementing Section 104(c) (9).[11]

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[11] Indeed, petitioners assert (Pet. 11) that the Holley Bill coerced Vermont and Mississippi into authorizing new waste disposal facilities and intimate (Pet. 17) that disposal of waste from those States is no longer banned. In fact, Alabama continues to prohibit the disposal of waste generated within those States. This further demonstrates the lack of any relationship between the Holley Bill and Section 104(c) (9).

Petitioners' comments (Pet. 11-12) regarding North Carolina's alleged noncompliance with Section 104(c) (9) fail to note that the EPA—the federal agency charged with ensuring compliance with that statute—has informed the Governor of

Alabama's action is also inconsistent with the purpose of Section 104(c)(9), which was to *increase* the availability of disposal facilities. As Senator Chafee observed, "if RCRA and Superfund programs are to work—if public health and the environment are to be protected—the necessary sites must be made available." 132 Cong. Rec. S14924 (Oct. 3, 1986). The Emelle facility is one of those necessary sites yet Alabama seeks to restrict its availability.

Finally, petitioners contend (Pet. 12-15) that this Court's decision in *Maine* v. *Taylor*, 477 U.S. 131 (1986), supports the constitutionality of the Holley Bill. That case involved a Maine statute that banned the importation of out-of-state baitfish. This Court measured the constitutionality of the statute under the stringent strict scrutiny standard applicable to measures that discriminate against interstate commerce. It upheld the statute because Maine had "legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.'" *Id.* at 152 (quot-*City of Philadelphia*, 437 U.S. at 627). The out-of-state baitfish had a physical characteristic—the presence of a parasite—that was "not common to wild fish in Maine" and, in addition, shipments of out-of-state baitfish could include non-Maine species that "could disturb Maine's aquatic ecology to an unpredictable extent." 477 U.S. at 141. The State proved that no measure short of a complete ban would allow

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North Carolina of the defects in that State's capacity assurances and sought further information regarding North Carolina's plan to ensure disposal capacity for hazardous waste. The EPA advised North Carolina that it faced the loss of federal funds if it failed to revise its capacity assurance plan so as to comply with Section 104(c)(9). [Current Developments] Env't Rep. (BNA) 2028 (Mar. 15, 1991).

the State to exclude non-Maine fish and fish with parasites effectively; existing sampling and inspection procedures would not allow identification of those fish. Because the purposes underlying the ban —protection of Maine fish from external threats— "could not adequately be served by available nondiscriminatory alternatives," the Court upheld the statute. *Id.* at 151.

Taylor thus rested squarely on this Court's determination that the record in that case established that out-of-state baitfish posed a substantially different threat to the environment than in-state baitfish. *Taylor* is inapplicable here because, as the court of appeals found (Pet. App. A12), petitioners have made no such factual showing. Rather, the record establishes that the hazardous waste whose disposal is banned does not differ in any respect from the hazardous waste whose disposal is permitted. "Alabama did not ban hazardous wastes from all other states on the ground that the wastes were dangerous to some human health or environmental aspect which Alabama has a right to regulate. Alabama's ban does not distinguish on the basis of type of waste or degree of dangerousness, but on the basis of the state of generation." Pet. App. A13. That is precisely what the Commerce Clause forbids.

Moreover, to the extent that Alabama's concern is that too great an amount of hazardous waste is being disposed of within the State, there is an available nondiscriminatory alternative to the Holley Bill. Alabama could have imposed a nondiscriminatory limit on the amount of waste disposed of within the State.[12] The existence of that alternative confirms

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[12] Any such measure would, of course, have to pass muster under the federal Constitution and applicable federal statutes

that the Holley Bill—one of the most blatantly discriminatory means by which to advance this interest —violates the Commerce Clause.

In sum, petitioners have failed to establish that the Holley Bill advances a legitimate local interest that could not be furthered by nondiscriminatory means. The statute plainly violates the Commerce Clause.

B. There Is No Conflict Among The Lower Courts Regarding The Question Presented In This Case.

In the years since this Court's decision in *City of Philadelphia*, the lower courts have decided a number of cases involving Commerce Clause challenges to state laws that discriminated on their face in favor of especially dangerous waste generated within the State and against especially dangerous waste generated in other States. In every case, the state law has been held to violate the Commerce Clause. *Illinois* v. *General Electric Co.*, 683 F.2d 206, 214 (7th Cir. 1982), cert. denied, 461 U.S. 913 (1983) (radioactive waste); *Washington State Building & Construction Trades Council* v. *Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983);

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as well as state law. Alabama has enacted a provision imposing a cap on the amount of waste that may be disposed of at the Emelle facility. See Ala. Code § 22-30B-2.3 (1990 Supp.). That provision has been upheld by an Alabama trial court. *Chemical Waste Management, Inc.* v. *Alabama Dep't of Revenue*, CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal pending, No. 190-1043 (Ala. Sup. Ct.). CWM has appealed that decision because the cap provision itself violates the Commerce Clause (by singling out the Emelle facility and exempting facilities that dispose of hazardous waste generated within Alabama) as well as other provisions of federal and state law.

Hardage v. *Atkins*, 582 F.2d 1264, 1266 (10th Cir. 1978) ("controlled industrial waste"); *Hazardous Waste Treatment Council* v. *South Carolina*, 32 Env't Rep. Cas. (BNA) 1646 (D.S.C. 1991); *Chemical Waste Management, Inc.* v. *Alabama Department of Revenue*, CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991).[13]

Not one of these courts has questioned that all types of waste are articles of commerce entitled to the protections of the Commerce Clause. Moreover, all of these courts have applied the standard prescribed by this Court in *City of Philadelphia* and its progeny. There is no reason for this Court to review the court of appeals' application of settled principles in a manner consistent with the decisions of other lower courts.[14]

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[13] Petitioners argue in the stay application presented to Justice Kennedy that the decision below conflicts with *Bill Kettlewell Excavating, Inc.* v. *Michigan Dep't of Natural Resources*, 1991 WL 65771 (6th Cir. May 1, 1991). But that case involved a Michigan statute that required approval for disposal of out-of-*county* waste. The Sixth Circuit specifically distinguished the case before it from one involving a statute discriminating on its face against out of-*state* waste, observing that the language of the Michigan law "places in-county and out-of-county waste in separate categories, but it does not treat out-of-county waste from Michigan any differently than waste from other states." *Id.* at *4. That case is therefore wholly irrelevant here, where there is clear express discrimination against out-of-state waste.

[14] Petitioners suggest (Pet. 8-9) that this Court should grant review because this case formerly would have fallen within the Court's appeal jurisdiction. As petitioners acknowledge, however, this Court's jurisdictional statutes were amended in order to eliminate any obligation to decide cases not presenting important federal issues. Certiorari should not be granted precisely because there is no important issue

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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presented in this case. Indeed, in view of the settled nature of the legal principles applied by the court of appeals, an appeal in this case almost certainly would have been summarily affirmed on the ground that it raised no substantial federal question. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 244-245 (6th ed. 1986).

(3)

Supreme Court, U.S.
FILED
JUN 4 1991
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NO. 90-1718

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama;

Petitioners,

v.

NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

A. This Case Presents Important Legal Questions Warranting Review.

This case presents substantial questions of federal constitutional law. Whether hazardous waste is an article of commerce entitled to full constitutional protection under the Commerce Clause and whether a state under its historic police power can regulate hazardous waste are timely and important *national* questions. The answers to these questions are important to the Congress, the States, and the lower courts, who all need guidance for the effective administration of hazardous waste management programs.

Far from being a "settled . . . area of law," as contended by respondents (Respondents' Brief in Opposition, at 8), there is an emerging split of authority in the circuits. One line of cases follows the principles enunciated in the 1978 decision in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), viz., the Eleventh Circuit here; while another line follows the rationale of the more recent 1986 decision in *Maine v. Taylor*, 477 U.S. 131 (1986), viz., the Sixth Circuit in *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of National Resources*, 1991 WL 65771 (6th Cir. May 1, 1991).

One commentator has acknowledged that *Maine v. Taylor* altered the standard of review of what may appear to be a facially discriminatory statute in environmental cases:

> Also under *Maine* a new interpretation of Commerce Clause principles was offered, accepted and transformed into law. . . .
>
> *The decision in Maine has altered the standard of strict scrutiny under which discriminatory statutes are evaluated.* Substantial uncertainties surrounding the effects of a particular environmental statute now shift the burden of proof back onto the challenger of a facially or de facto discriminatory statute. *The strict scrutiny presumption of invalidity has been shifted and discriminatory statutes are no longer treated any differently*

> *under Commerce Clause scrutiny than statutes that regulate evenhandedly.*

Note, *Maine v. Taylor: Natural Resources Statutes Against the Commerce Clause or When is a Hughes not a Hughes But a Pike?*, 29 Natural Resources Journal 291, 301-02 (Winter 1989) (emphasis added).

In *Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources*, the Sixth Circuit considered a Michigan statute that authorized counties to adopt a waste management plan. Under such a plan each county was authorized to prohibit the disposal of out-of-county waste in the county. 1991 WL 65771 (6th Cir. May 1, 1991). In other words, a county could restrict the disposal of waste solely to waste generated within that county. Under the statute, a private plaintiff landfill operator was completely prohibited from landfilling out-of-state waste and was limited to landfilling only waste generated in the county where the facility was located. The Sixth Circuit followed the approach in *Maine v. Taylor* rather than striking down the statute under *City of Philadelphia*. Therefore, despite respondents' assertion to the contrary, there is a split of authority in the decisions emerging after the 1986 decision in *Maine v. Taylor*.[1]

The petition should be granted because the case involves important issues of federal constitutional law and there is an emerging split of authority in the circuits on these important questions.

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[1]Respondents argue that there is no conflict among the lower court decisions and cite *inter alia Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Washington State Building & Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); and *Hardage v. Atkins*, 582 F.2d 1264 (10th Cir. 1978). These cases were decided before *Maine v. Taylor*. Respondents attempt to distinguish *Kettlewell* on the basis it did not expressly exclude out-of-state waste, but only waste from another county. However, if out-of-county waste is excluded, then *a fortiori* out-of-state waste is excluded. In fact, the exclusion of interstate waste is exactly what was litigated in *Kettlewell*, with the result that the waste disposal company was prohibited from importing and landfilling interstate waste.

B. Hazardous Waste Landfilling Poses a Genuine Danger to Public Health and the Environment.

Respondents incorrectly argue that "[w]hen such waste is properly managed pursuant to the applicable federal and state regulations, any health hazard is minimal." Respondents' Brief, at 2-3. First, just because the landfilling of hazardous waste at Emelle, Alabama, may be done in accordance with current federal regulations, does not mean there is no danger. The fact that the "unsinkable" Titanic was built in accordance with then current ship-building standards did not avoid a terrible maritime disaster.

Second, the record is replete with evidence that landfilling of hazardous waste has both known and unknown dangers. The District Court herein found that the risks of hazardous waste are indeed serious. See Petition, at 5-6. Further, respondents cite the case of *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue,* CV-90-1098 (Ala. Cir. Ct. Feb. 28, 1991), appeal and cross-appeal pending, No. 190-1043 (Ala. Sup. Ct.). That state court case also involved the disposal of hazardous waste at the same Emelle hazardous waste landfill. Following a four day trial, the state judge found with respect to Emelle that: "The increase in tonnage has resulted in a significant increase in problems with regard to regulating and supervising the disposal of hazardous waste." *Chemical Waste Management, Inc. v. Alabama Dep't of Revenue,* CV-90-1098, Mem. Opinion, at 7.

That court further found that: (1) hazardous waste landfilled at Emelle includes "substances that are inherently dangerous to human health and safety and to the environment" and consisted of "ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." *Id.* at 10; (2) landfilling of the wastes produces leachate, a poisonous liquid, *Id.* at 11; (3) that it is inevitable that leachate will leak from closed trenches and spread into the underlying chalk formations; and, in fact, that

"it appears that leakage has already occurred with respect to at least some of the closed trenches." *Id.*; (4) that preventing leakage of leachate is beyond present technology, *Id.* at 12; (5) that monitoring wells have been installed at Emelle to attempt to monitor the spread of leachate, and "Periodic checks of those monitoring wells will be required *forever.*" *Id.* at 14 (emphasis added); (6) because the monitoring wells cannot monitor all locations, there is uncertainty whether contamination will be detected by the monitors, *Id.*; (7) that in 1989, 40,000 truckloads of wastes were transported over Alabama highways to Emelle and 34,000 to 36,000 were from out-of-state, *Id.*; and (8) that "Some of the trucks destined for Emelle have been involved in accidents causing hazardous waste to be spilled or released into the environment; several incidents of releases of hazardous wastes and noxious fumes have already occurred at the facility; and these risks are increased by the increasing volumes." *Id.* at 15.

These court decisions pertaining specifically to the Emelle facility are not the only authorities for the inherent dangers of commercial hazardous wastes landfilling. In a recent report to Congress, the United States General Accounting Office studied the ongoing dangers of hazardous waste disposal. *See* GAO/RCED-90-64, "HAZARDOUS WASTE, Funding of Postclosure Liabilities Remains Uncertain" (June 1990). The report summarizes the real dangers of land disposal facilities such as Emelle as follows:

> As evidenced by the events at Love Canal, Times Beach, and thousands of other sites contaminated by hazardous wastes, ***land disposal of these wastes presents a significant threat to human health and the environment.*** Hazardous waste disposal can contaminate the land as well as ground and surface waters. Once contaminated, cleanup of a hazardous waste site can cost millions, take many years to complete, and in some cases it may not be possible to remove all contamination. Moreover, many contaminants are

> toxic, may lead to cancer, or have other adverse human health effects.

Id. at 8 (emphasis added).

The report concludes "for the long term — beyond 30 years — there are questions about the effectiveness of EPA's current requirements . . . EPA is concerned about the effectiveness of its standards for the long term prevention of waste migration and the potential for postclosure liabilities." *Id.* at 15.[2]

Respondents imply that landfilling of hazardous waste poses little or no danger because the waste is pretreated to reduce its toxicity before burial. Respondents' Brief, at 2-3. GAO observed with respect to pretreatment, "[A]lthough some wastes degrade or can be made less hazardous through treatment, *some substances remain hazardous forever.*" *Id.* (emphasis added). GAO found "the magnitude of post-closure liabilities that could be incurred *simply cannot be measured at this time.*" *Id.* (emphasis added).

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[2]The report continues:

> Leakage that does occur after closure could result in significant liabilities such as corrective action costs and off-site damage claims. However, because of a lack of experience-based information, insufficient data exist on the extent and timing of potential leakage as well as the actions required to correct such leakage. Consequently, the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time.
>
> EPA is concerned about the effectiveness of its standards for the long-term prevention of waste migration and the potential for postclosure liabilities. Both GAO and EPA's Science Advisory Board have recommended the development of a strategy — describing activities and time frames for their completion — to address such concerns. However, because post-closure at currently operating hazardous waste disposal facilities is not viewed as a current environmental problem EPA has made this issue a lower priority in the RCRA program and has not developed the necessary strategy.

Id. at 15.

The consequences of hazardous waste landfilling are still imperfectly understood. EPA's own Science Advisory Board acknowledges this uncertainty: "[T]he Board determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term." *Id.* at 24. Moreover, EPA's Science Board recognizes that the current EPA regulations are far from sacrosanct: "The report further concluded that there is an absence of a waste management strategy . . . necessary to develop the scientific and technical knowledge for developing land disposal guidance and regulations." *Id.* "According to EPA officials, a comprehensive strategy for addressing long-term postclosure concerns at permitted hazardous waste facilities has not been developed." *Id.*

Accordingly, respondents' argument that hazardous waste is not dangerous because it is landfilled in accordance with current EPA regulations provides little solace, particularly given that EPA itself is concerned about "the effectiveness of its standards." *Id.* at 15. As GAO notes, "The [EPA] report concluded that there is a need to evaluate and understand the long-term performance of what are now considered environmentally sound land disposal practices to ensure that these practices are environmentally sound for many decades." *Id.* at 24.

Respondents incorrectly argue that the *City of Philadelphia* holding of regular solid waste to be an article of commerce "applies with equal force to hazardous waste." Respondents' Brief, at 9. As shown above, the landfilling of hazardous waste is distinct because of its real dangers and the uncertainties surrounding the short and long term risks. Thus, ChemWaste is incorrect in its assertion that the issues have been decided and further inquiry is unwarranted.

C. The Holley Bill is Constitutional Under *Maine v. Taylor*.

The decision in *Maine v. Taylor* makes a distinction between state measures which discriminate arbitrarily against out-of-state commerce and attempt to place in-state interests in a position of commercial advantage, i.e., "simple economic protectionism," and state measures which seek to protect public health, safety, or the environment. The 1986 *Maine v. Taylor* decision was based upon the historic police power of states to protect public safety and health.[5] "This distinction between the power of the State to shelter its people from menaces to their health and safety . . . , even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525,533 (1949). Respondents can cite to no decision of this Court which has struck a state restriction on the importation into the state of out-of-state items for the actual (as opposed to claimed) purpose of protecting the health and safety of the state's citizens or the environment.

Even in the face of the known and unknown dangers of landfilling large volumes of hazardous waste (and the fact that current land disposal consequences "simply cannot be measured at this time"), Alabama has chosen not to close its borders to hazardous waste, as was done by St. Clair County in Michigan. *See Kettlewell*, 1991 WL 65771 (6th Cir. May 1, 1991). Instead, reasonable legislation was adopted allowing the nation to enjoy the benefits of the Alabama facility, while motivating some states to exercise responsibility to the degree they

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[5]It also follows in the historic tradition of the "quarantine cases." *See Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Railroad Co. v.. Husen*, 95 U.S. 465 (1878).

can by either siting facilities *or* making agreements with Alabama.[4]

It is not unreasonable for Alabama to assert its police powers and to implement its capacity assurance program under SARA to require that states shipping hazardous waste to Alabama for permanent burial should be required to **either** site a treatment or disposal facility **or** enter into an agreement with Alabama. A real interstate partnership can thereby by achieved, with the continued availability of Emelle, but with a reduction of interstate waste by increased disposal in the generating states.

The District Court found that Alabama in enacting the Holley Bill was not hoarding its natural resources, as was New Jersey in *City of Philadelphia*. *See* Petition, App. C, at A-53-54. New Jersey tried to close its landfills to out-of-state waste to preserve capacity for large volumes of domestic waste. Here, the level of in-state hazardous waste landfilled at Emelle is minimal compared to that of out-of-state waste. This case is not economic protectionism, "simple" or otherwise, nor is it a case of hoarding natural resources. Rather, the economic interests sought to be protected in this case are those of ChemWaste, a private company, with a monopoly to import hazardous waste to Emelle, which it admits has disposal capacity for another 100 years.[5]

---

[4]Respondents argue that the Holley Bill contains a reciprocity provision similar to other statutes invalidated by the Court. In support of this argument respondents cite *New Energy Co. v. Limbach*, 486 U.S. 269 (1988); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982); and *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976). Those cases involved reciprocity provisions where equal treatment of out-of-state products or interests was contingent upon reciprocal treatment of product or interests from the granting state. The Holley Bill does **not** contain that type of reciprocity provision. Other states are **not** required to accept Alabama generated hazardous waste in exchange for acceptance of their hazardous waste.

[5]ChemWaste "estimates there is capacity at Emelle for another 100 years of operation." *ChemWaste*, CV 90-1098, Mem. Op., at 9.

The *Maine v. Taylor* approach was followed by the District Court in this case, as it was by both the District Court and the Sixth Circuit in *Kettlewell*. The Eleventh Circuit erred by mechanically following *City of Philadelphia*, as did the First Circuit in *Maine v. Taylor*. The petition in this case lists the factors that distinguish this case from *City of Philadelphia*. *See* Petition, at 16-17. Respondents did not address those distinctions.

The Court of Appeals here applied a superficial analysis of the Commerce Clause and never got beyond the initial consideration of what may appear to be a facially discriminatory statute. That was the same analysis employed by the First Circuit in *Maine v. Taylor*[6] and rejected by this Court. However, the determinative issues in this case are not whether the act facially discriminates, but whether Alabama through the Holley Bill may conditionally exclude out-of-state wastes to protect public health, safety and the environment. Are the principles of *Maine v. Taylor* to be followed, rather than those earlier announced in *City of Philadelphia*?[7]

CONCLUSION

The legal questions presented in this case involve important issues of federal constitutional law. These questions are worthy of the Court's review, not only because of the emerging con-

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[6] *United States v. Taylor*, 752 F.2d 757 (1st Cir. 1985).

[7] As one commentator recently observed: "The quarantine analogy that [Chief Justice] Rehnquist supports in his *Philadelphia* dissent may have greater force today in light of the more complete data about hazardous waste production and the contamination of the environment that would be available to the Court." Note, *Hazardous Waste in Interstate Commerce: Minimizing the Problem After City of Philadelphia v. New Jersey*, 24 Val. L. Rev. 76, 101 (1989).

flict in lower court decisions, but because commercial hazardous waste landfilling is a significant national problem. It is a problem today, and if not properly managed, will be a greater problem tomorrow. This Court's review is necessary if national and state decisionmakers are to have clear guidelines to follow in setting local hazardous waste management policy. The petition should be granted and the Holley Bill upheld.

June 3, 1991

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No. 90-1718

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners,

against

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

Brief of the State of New York as Amicus Curiae in Support of Petitioners.

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(1070—LC3-638)

Question Addressed

In enacting the Superfund Amendments and Reauthorization Act, did Congress authorize states to manage the interstate flow of hazardous wastes in order to meet the federally-mandated requirement that states demonstrate longterm capacity for disposal of such wastes?

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Brief of the State of New York as Amicus Curiae in Support of Petitioners

Interest of Amicus Curiae

The State of New York submits this brief in support of the State of Alabama's petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in

National Solid Wastes Management Association v. Alabama Department of Environmental Management, 910 F2d 713 (11th Cir., 1990).

The State of New York has a substantial interest in the outcome of this case. Like Alabama, New York has a large commercial hazardous waste disposal facility within its borders. The New York facility is the only one in the northeastern United States. In the fall of 1989, it became apparent to New York officials that other Northeastern states intended to meet the capacity assurance obligations mandated by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §9604(c)(9) ("SARA") simply by continuing to utilize New York's disposal capacity, in lieu of expanding their own capacity as envisioned by SARA.

In response, New York Commissioner of Environmental Conservation Thomas C. Jorling announced his intention to manage the flow of hazardous wastes sent from other states through cooperative agreements with individual states. Each agreement will require that New York industries be allowed to send wastes to on-line facilities in the cooperating state; further, such state must commit to impose waste reduction requirements on its generators and transporters equivalent to requirements contained in New York law.[1]

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[1]New York has one of the most aggressive hazardous waste reduction laws in the nation. *See,* Environmental Conservation Law §§§ 27-0907, 0908 and 0913. These provisions require hazardous waste generators to audit their operations and to implement waste reduction measures to the maximum extent practicable. Stiff penalties are imposed for noncompliance. Ultimately a recalcitrant generator could be forced to curtail operations because it could not issue the certifications necessary to transport hazardous waste for disposal. This program reflects New York's preferred hazardous waste management hierarchy, codified at Environmental Conservation Law § 27-0105, which calls for: (1) reduction or elimination of hazardous wastes that continue to be generated; (2) reuse and recycling of hazardous wastes that continue to be generated; (3) use of detoxification, treatment or destruction technology; and (4) phasing out land burial of hazardous wastes except for treated residuals posing no significant threat to public health or the environment.

New York subsequently imposed these restrictions in a proposed permit modification to the New York land disposal facility. The operator of that facility, Chemical Waste Management, then filed suit in the Western District of New York on December 18, 1990, asserting *inter alia,* that New York's proposed modifications violate the commerce clause. *National Solid Wastes Management Association and CWM Chemical Services, Inc. v. Jorling,* 90-CV-1288A. The Commissioner has defended on the ground that SARA's capacity assurance provisions authorize New York's proposed restrictions on interstate commerce.

The State of New York respectfully urges this Court to grant *certiorari,* reverse the lower court's decision, and decide that in enacting SARA, Congress authorized states to manage interstate commerce in order to meet the federally-mandated capacity assurance obligations.

Summary of Argument

The Superfund Amendments and Reauthorization Act of 1986 (SARA) expressed Congress' displeasure with the failure of many states to site new hazardous waste facilities, and addressed the "Not-in-My-Backyard" problem by requiring *all* states to demonstrate that they will have adequate in-state and out-of-state resources for disposing of all wastes generated within the state for the next two decades. In enacting SARA, Congress authorized states to manage out-of-state access to waste disposal facilities in order to meet these mandated capacity assurance requirements. Finally, the Holley Bill, passed by Alabama to ensure it would meet its capacity assurance obligations, is consistent with the Congressional authorization contained in SARA.

Argument

Congress enacted the capacity assurance provisions in SARA to force states to site new, state-of-the-art hazardous waste treatment facilities designed to safely handle wastes that industry continues to generate. By rejecting Alabama's claim that SARA authorized the restrictions contained in the Holley Bill, the lower court precluded Alabama from protecting its valuable disposal capacity from states that are content to continue to export unreasonable quantities of hazardous waste without regard to their own siting obligations. Review by this court is necessary to determine the ability of states to manage out-of-state hazardous waste imports in order to meet their federally-mandated capacity assurance requirement.[2]

A. In enacting the capacity assurance provisions of SARA, Congress authorized states to manage the interstate flow of hazardous waste to meet their assurance obligations.

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.* ("CERCLA") in order to ensure cleanup of inactive hazardous waste sites. CERCLA established liability standards for persons responsible for cleanups and

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[2]Although Alabama argued in the lower court that SARA authorizes the Holley Bill, *see*, 910 F2d at 721-22, petitioners have apparently not included this issue in their petition for *certiorari*. Instead they have opted to focus on their constitutional claim. *See*, "Questions Presented" in Alabama's petition. In light of this Court's time-honored practice of not reaching constitutional issues, *see, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them"), the State of New York respectfully suggests that, in the event *certiorari* is granted, the Court can reverse the lower court on the nonconstitutional ground that the Holley Bill is authorized by Congress' enactment of SARA.

created a "Superfund" for use when responsible parties do not carry out cleanups. *See,* 42 USC § 9601, *et seq.*

Congress reauthorized CERCLA in 1986, enacting the Superfund Amendments and Reauthorization Act ("SARA"), P.L. No. 99-499. Because Congress concluded that few states had developed programs to assure safe disposal capacity for hazardous waste which continues to be generated by industry, it enacted a capacity assurance provision ("CAP"), codified at § 104(c)(9) of SARA, 42 USC § 9604(c)(9). This provision directed each state to demonstrate to the United States Environmental Protection Agency ("EPA") that the state will have adequate capacity available to dispose of the hazardous wastes generated within the state for the next twenty years.

The legislative history of SARA demonstrates that the intent behind the capacity assurance obligations was to ensure adequate siting of new, state-of-the-art hazardous waste management facilities across the country. *See,* S. Rep. No. 11, 99th Cong, 1st Sess. 22 (1985):

> "Pressures from local citizens place the political system in an extremely vulnerable position. . . . The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of creating new facilities]. A common result has been . . . no significant increase in hazardous waste capacity over the past several years."

Similarly, Senator Chafee, the sponsor of the CAP provision, stated on October 3, 1986 (the date upon which the legislation passed the Senate) that:

> "The objective of the siting amendment is to *force* states to provide safe and adequate facilities for toxic and hazardous waste."

132 Cong. Rec. S. 14924 (emphasis supplied).

Congress recognized that not every State would be able to create new disposal facilities or otherwise manage its waste within its own borders for the next twenty years. Thus, states have the option of using capacity outside of their state in accordance with agreements with other states. If EPA determines that state capacity certifications are not adequate, the State is prohibited from receiving Superfund money for hazardous waste site cleanups taken within the State. 42 USC § 9604(c) (9).

The CAP amendments thus contain two important elements: first, they force states to plan for and develop safe disposal or treatment capacity for all hazardous waste generated for a twenty year period; second, to the extent a State uses disposal facilities outside the state, it can only do so pursuant to an interstate or regional agreement with the states in which such facilities are located. As such, Congress has authorized states to manage out-of-state access to waste disposal facilities which such states are dependent upon to meet their capacity assurance requirements.

While Congressional consent for states to impede commerce must be clear, there is no "talismanic significance" to any particular method of demonstrating Congressional authorization. *South Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 90 (1984). This Court has identified three ways in which such consent may be established: (1) from Congressional intent, *see, Wunnicke, supra* at 92-93; (2) through an evaluation of federal policy, *Wunnicke* at 88; and (3) based upon a course of conduct, *Wardair Canada, Inc. v. Florida Department of Revenue,* 477

U.S. 1, 10 (1986). Significantly, once Congress has authorized state regulation of interstate Commerce, *any* action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge. *Western and Southern Life Insurance Co. v. State Board of Equalization of California,* 451 U.S. 648 (1981).

As demonstrated above, Congress determined that it was in the national interest to ensure development by the states of safe, long-term disposal capacity for hazardous waste which continued to be generated nationwide. In enacting the CAP provisions, Congress intended to *force* states to develop such capacity, and threatened states with the loss of Superfund cleanup monies in the event of failure. The only way for states to avoid this drastic penalty is to regulate the flow of waste to the capacity that exists within their state—the Emelle landfill in Alabama's case. Any other construction of SARA would prevent a State from managing and predicting capacity, and would ultimately subject it to the loss of Superfund dollars.

B. The Holley Bill is consistent with the Congressional authorization to the states contained in SARA.

Finally, the Holley Bill, enacted by Alabama to satisfy its federally-mandated CAP obligations, is consistent with the authorization conferred by Congress in SARA. The bill assists in forcing the development of new capacity because it limits access to Alabama's Emelle disposal facility and forces states previously dependent upon Emelle to address their fair share of the national waste management problem. By being forced to site facilities, as contemplated by Congress, a State has capacity for some types of wastes which it can then use to "bargain" with other states which have other types of facilities (e.g., landfills, incinerators, recy-

cling plants) so as to assure the execution of interstate agreements.

CONCLUSION

For the foregoing reasons, the State of New York respectfully urges this Court to grant certiorari and reverse the decision of the lower court.

Dated: Albany, New York
June 3, 1991

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE STATE OF SOUTH CAROLINA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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ADDITIONAL QUESTION PRESENTED

If the Court grants the petition for writ of certiorari, it should specify one additional question, as follows:

> Whether the court of appeals erred in using dormant Commerce Clause principles to test the challenged portions of Alabama's hazardous waste program rather than using the standard adopted by the U.S. Environmental Protection Agency ("EPA") to test consistency of state hazardous waste programs with federal law pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), when Alabama's program has been authorized by EPA to operate "in lieu of" federal law under RCRA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1718

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE STATE OF SOUTH CAROLINA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The State of South Carolina respectfully submits this brief pursuant to this Court's Rule 37.5 as *Amicus Curiae* in support of the Petition of the Alabama Department of Environmental Management ("ADEM"); Leigh Pegues, Director of ADEM; and Guy Hunt, Governor of the State of Alabama, for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in these proceedings on August 8, 1990, 910 F.2d 713, as modified upon denial of rehearing, 924 F.2d 1001.

INTEREST OF THE STATE OF SOUTH CAROLINA

The State of South Carolina, like Alabama, has been authorized by the U.S. Environmental Protection Agency ("EPA") to operate a hazardous waste management program "in lieu of" federal law pursuant to Section 3006(b) of the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), 42 U.S.C. § 6926(b). Portions of South Carolina's program have also been challenged in federal court by private parties on Commerce Clause grounds. In South Carolina's case, on January 11, 1991, the U.S. District Court for the District of South Carolina preliminarily enjoined broad portions of South Carolina's program as violating the Commerce Clause. *Hazardous Waste Treatment Council v. South Carolina*, 32 Env't Rep. Cas. (BNA) 1646 (D.S.C. 1991), *appeal pending*, No. 91-2317 (4th Cir., argued May 6, 1991). The District Court for the District of South Carolina, like the court of appeals here, reached its decision based upon dormant Commerce Clause principles, rather than by reference to the special standard adopted by EPA to test the consistency of a state's federally-approved hazardous waste program with federal law, including effects on interstate commerce. South Carolina has appealed the district court's preliminary injunction to the U.S. Court of Appeals for the Fourth Circuit; after expedited briefing, oral argument on its appeal was heard May 6, 1991. Although the respective laws of Alabama and South Carolina under challenge are factually distinct, explication by this Court of the proper standard for judging effects on interstate commerce of approved state hazardous waste regulatory programs would be important to guide South Carolina, and EPA, and the states generally, in the appropriate implementation of the federal structure of RCRA.

ADDITIONAL STATUTES AND REGULATORY PROVISIONS INVOLVED

Pertinent portions of Sections 3006 and 3009 of RCRA, 42 U.S.C. §§ 6926 and 6929, are set out in an Appendix to this brief, along with EPA's implementing regulation, 40 C.F.R. § 271.4. Also set out in the appendix is 50 *Fed. Reg.* 46,437-440 (November 8, 1985), a decision by EPA applying 40 C.F.R. § 271.4(a) in approving South Carolina's hazardous waste program. The program included higher fees for disposal within the State of hazardous wastes generated outside the State than for disposal of wastes generated within South Carolina.

SUPPLEMENTAL STATEMENT OF THE CASE

RCRA Section 3006(b) provides that a state may be authorized to "administer and enforce a hazardous waste program" upon authorization from EPA. 42 U.S.C. § 6926(b). EPA *must* authorize the state program unless EPA finds that it "is not equivalent to the Federal program," "is not consistent with the Federal or State programs applicable in other States," or "does not provide adequate enforcement of compliance with the requirements of [RCRA]." *Id.*

Once the state's program is approved by EPA, the state "is authorized to carry out such program in lieu of the Federal program." *Id.* Any action taken by a State under an authorized hazardous waste program has "the same force and effect as action taken by [EPA] under [RCRA]." 42 U.S.C. § 6926(d). In addition, RCRA Section 3009 expressly authorizes the states to impose hazardous waste laws "which are more stringent than those imposed by [RCRA]," and it preserves state authority against preemption by federal regulatory requirements, provided that the state provisions are not "less stringent than those authorized under [RCRA Sections 3001-3020] respecting the same matter." 42 U.S.C. § 6929. A state's authorization continues until EPA de-

termines after a public hearing that the state program no longer conforms with federal requirements. 42 U.S.C. § 6926(e).

Alabama's hazardous waste management program was approved as not inconsistent with RCRA on December 8, 1987. *See* 52 *Fed. Reg.* 46,466 (December 8, 1987). Until authorization is withdrawn, therefore, action taken by Alabama pursuant to its program operates with "the same force and effect as action taken by [EPA]."

EPA's regulations governing the authorization of state hazardous waste programs are contained in 40 C.F.R. Part 271. The regulations establish standards to evaluate whether a state hazardous waste program is "consistent" with federal law, and these standards explicitly address effects on interstate commerce. In particular, 40 C.F.R. § 271.4(a) provides:

> Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

In addition, the regulations provide for periodic review by EPA of changes in state programs after they have been authorized, 40 C.F.R. § 271.21, and they specify criteria and procedures for withdrawal of authorization, including citizen petitions to EPA for public withdrawal and participation in withdrawal proceedings, *id.* §§ 271.22-23.

EPA adopted Section 271.4(a), its "reasonableness" test for adjudging effects on interstate commerce under RCRA, after giving explicit consideration to statutory requirements and to holdings of this Court interpreting the "dormant" Commerce Clause. *See* 45 *Fed. Reg.*

33,290, 33,395 (May 19, 1980).[1] EPA has characterized the "unreasonably restricts" language of Section 271.4(a) as creating a "facts and circumstances test." 50 *Fed. Reg.* 46,437, 46,440 (November 8, 1985), Appendix *infra*, at 13a. In evaluating a restriction on the interstate movements of hazardous waste, EPA "will look to all relevant factors." *Id.* at 46,439, Appendix *infra*, at 11a. EPA considered the relevance of this Court's holding in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), to its test, but concluded that the "Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here." 50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a.

The requirements in RCRA for facilities which actively generate, treat, store, and dispose of hazardous wastes are complemented by provisions in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CERCLA provides for remedies to be applied at a facility or property that has been contaminated with hazardous substances, and it makes broad categories of persons liable for costs of cleanup. In 1986, a provision was added to CERCLA to address assured capacity for treating and disposing of hazardous wastes. As added by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Paragraph 104(c)(9) of CERCLA provides that each State must provide assurance to EPA that the State will "have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during" the next 20 years. 42 U.S.C. § 9604(c)(9). *See* Petition at 2-3.

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[1] EPA took account of the fact that RCRA for some purposes requires reference to the state of origin of hazardous wastes, *e.g.*, for operation of the "manifest" system of tracking wastes, 40 C.F.R. Part 262, Subpart B. The RCRA regime also must accommodate implementation of states' "more stringent" requirements under Section 3009 of RCRA, 42 U.S.C. § 6929.

EPA's implementation of this capacity-assurance provision of CERCLA is closely tied to and coordinated with its RCRA regulatory regime. As specified in CERCLA § 104(c)(9), EPA required each state by October 17, 1989, to submit for approval a Capacity Assurance Plan demonstrating that adequate means had been or would be provided for all hazardous wastes generated within the state over the following 20 years, to 2009. In a policy memorandum dated December 23, 1988, then-Administrator Lee Thomas directed that the process for developing, evaluating, and approving Capacity Assurance Plans be used as EPA's primary means of addressing "State action which may be inconsistent with the federal Resource Conservation and Recovery Act program," and that the RCRA state-authorization withdrawal process be used only "after determining that the CERCLA process has proven ineffective." Memorandum from Lee M. Thomas to Regional Administrators, "Policy Regarding Hazardous Waste Management Capacity and RCRA Consistency Issues" (December 23, 1988).

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Erroneous Reliance On Dormant Commerce Clause Principles, Rather Than Application Of The Standard Derived From Congress' Exercise Of Commerce Clause Power, Presents Important Legal Issues Respecting State Powers And The Proper Administration Of RCRA.

The court of appeals' reliance on the dormant Commerce Clause to invalidate Alabama's hazardous waste program disrupts the balance between federal and state regulation previously struck by Congress when it enacted RCRA and entrusted its administration to EPA. Because of the importance of this issue to the states and to the proper administration of RCRA and hazardous waste management pursuant to RCRA, the petition for writ of certiorari should be granted.

The Commerce Clause is an explicit grant of power to Congress. U.S. Const. art. I, § 8, cl. 3. Although in the

absence of congressional action the "dormant" Commerce Clause is a "self-executing limitation on the power of the States," *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984), once Congress has exercised its powers, the constitutional measure of state action is not that provided by the dormant Clause, but rather congressional language and intent, *Northeast Bancorp Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985); *Wunnicke*, 467 U.S. at 91-92. As a result of the enactment of RCRA and, subsequently, the 1986 amendments to CERCLA, "the commerce power of Congress is not dormant, but has been exercised by that body," *Northeast Bancorp*, 472 U.S. at 174.

Congress provided in RCRA that, upon approval by EPA, a state's hazardous waste program operates "in lieu of the Federal program." RCRA § 3006(b), 42 U.S.C. § 6926(b). Congress empowered EPA to develop and enforce implementing regulations for RCRA, and EPA has done so to explicate Section 3006(b). In those regulations EPA has specified the standard to be applied to determine whether the effects on interstate commerce of a state's hazardous waste program are impermissible. Specifically, only an aspect of a state program which "*unreasonably* restricts, impedes, or operates as a ban" on the interstate movement of hazardous waste "shall be deemed inconsistent" and thus not in compliance with Section 3006. 40 C.F.R. § 271.4(a) (emphasis added).

In adopting and applying Section 271.4(a), EPA considered and dismissed the proposition that states could not impose restrictions on interstate commerce in hazardous waste. EPA expressly rejected the contention revived by the court of appeals in the present case that a "virtually *per se* rule of invalidity," *City of Philadelphia*, 437 U.S. at 624, applies to state hazardous waste measures affecting interstate commerce. *Compare* 50 *Fed. Reg.* 46,437, 46,439 (November 8, 1985), Appendix *infra*, at 11a-12a, *with* 910 F.2d 713, 719-20, Pet. App. A-8 - A-13.

Instead, EPA stated that "Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable." 50 *Fed. Reg.* at 46,439, Appendix *infra*, at 11a. EPA determined that "all relevant factors" must be considered in assessing the permissibility of state laws with interstate effects. *Id.* In establishing that its reasonableness test applies, and not *per se* rules under the dormant Commerce Clause, EPA was quite pointed:

> *Congress gave EPA the authority to interpret the term "consistent"*; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. *Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test* as the test for consistency or unreasonable restrictions or impediments.

Id. (emphasis added), Appendix *infra*, at 12a.

The fact that Alabama's Holley Bill was adopted after EPA approved Alabama's hazardous waste program does not deprive it of its force under RCRA or subject it to scrutiny under dormant Commerce Clause precedents rather than 40 C.F.R. § 271.4(a). A state "program" approved pursuant to RCRA § 3006(b) is not static. Once approved, the State "is authorized to carry out [its] program *in lieu of the Federal program*," 42 U.S.C. § 6926(b) (emphasis added), unless and until EPA withdraws authorization of the program as a whole, *id.* § 6926(e). Change within a state's approved program does not require subsequent EPA authorization to become effective. Instead, "[p]rogram revision *may* be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented." 40 C.F.R. § 271.21(a) (emphasis added).[2] EPA explained the dis-

[2] This arrangement contrasts with State Implementation Plans under the Clean Air Act, for example, where state revisions to the plans are not effective unless expressly approved by EPA. *See* 42

cretionary nature of its power specifically in the context of state provisions that affect interstate waste:

> If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA *may find* that such changes are significant revisions to the State's program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be *unreasonable*, they would be grounds for withdrawal of the authorized program under § 271.22.

50 *Fed. Reg.* at 46,440 (emphasis added), Appendix *infra*, at 14a.

Although the court of appeals acknowledged in passing that Congress may redistribute power over interstate commerce, 910 F.2d at 721, Pet. App. at A-13, its exclusive reliance on dormant Commerce Clause cases effectively nullifies this fundamental precept.[3] "When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce . . . . Courts are final arbiters under the Commerce Clause only when Congress has not acted." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982) (footnote and citations omitted). Once Congress has acted, as it has here, the question is not determined by whether "the commerce clause 'of its own force' and without reference to any action by Congress . . . forbids discriminatory state" law, *Prudential Ins. Co.*, 328 U.S. at 422. Rather, the crucial questions are whether Congress has acted legitimately and "whether the policy stated [by Congress] extends to the kind of state legisla-

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U.S.C. § 7410(a). *See generally General Motors Corp. v. United States*, 110 S. Ct. 2528 (1990).

[3] The court of appeals should have stated this basic proposition in stronger terms. As this Court has said: "The commerce clause is in no sense a limitation upon the power of Congress over interstate and foreign commerce." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946).

tion which is immediately in issue." *Id.* at 427. And, contrary to the approach of the court of appeals in relying on *City of Philadelphia*, "those questions are not answered . . . by any conception that Congress' declaration of policy adds nothing to the validity of what states have done within the area covered by the declaration." *Id.*

The court of appeals misconstrued the effect of the cases decided on the basis of Congress' exercise of its Commerce Clause power by suggesting that congressional approval of the state's law must be " 'expressly stated.' " 910 F.2d at 721, Pet. App. at A-13. This Court has not been so grudging in giving effect to Congress' power, nor could it, for in taking so limited an approach "Congress' power over commerce would be nullified to a very large extent." *Prudential Ins. Co.*, 328 U.S. at 422. Contrary to the court of appeals' invocation, "[t]here is no talismanic significance to the phrase 'expressly stated.' " *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). Rather, "it merely states *one way* of meeting the requirement . . . for a state regulation to be removed from the reach of the dormant Commerce Clause," the ultimate test of which is "congressional intent." *Id.* (emphasis added). *See White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 213 (1983).[4]

The court of appeals was thus wrong to conclude that its task was simply "to determine whether Congress has authorized Alabama to erect its barrier to the interstate movement of hazardous wastes." 910 F.2d at 721, Pet. App. at A-13. Congress has authorized EPA to promulgate regulations and policies to implement RCRA and CERCLA, and EPA has addressed through these routes the permissibility of state hazardous waste laws that

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[4] In that regard, "[w]hen Congress enters the field by legislation, we try to discover to what extent it intended to exercise its power of redefinition" over the dormant Commerce Clause. *California v. Zook*, 336 U.S. 725, 728 (1949).

affect interstate commerce in hazardous waste. Just as the Federal Reserve Board is "an authoritative voice on the meaning of a federal banking statute," *Northeast Bancorp*, 472 U.S. at 168, so too is EPA's interpretation authoritative with respect to RCRA. This Court is required to defer to EPA's construction of RCRA and conclude that the pertinent standard for regulation by a state respecting interstate waste is the reasonableness standard of 40 C.F.R. § 271.4(a) as elucidated at 50 *Fed. Reg.* 46,439, Appendix *infra*, at 10a-13a. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 US. 837, 843 (1984).[5]

The court of appeals further erred in failing properly to account for the impact of the capacity assurance requirements in CERCLA § 104(c)(9), 42 U.S.C. § 9604(c)(9), on the legality of Alabama's Holley Bill. In assessing the reasonableness of a state restriction on interstate movement of hazardous waste under Section 271.4(a), the most "relevant factor" is the requirement of CERCLA § 104(c)(9)(A), 42 U.S.C. § 9604(c)(9)(A), that a state provide assurance that it will have available "adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes *that are reasonably expected to be generated within the State*" over the next 20 years (emphasis added). By its very terms, CERCLA § 104(c)(9) requires a state to give separate regard to wastes generated within its borders, and to demonstrate that it has provided explicitly for their treatment or disposal.

Moreover, the Section allows this demonstration to be provided by only limited means: the facilities relied upon

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[5] EPA's interpretation is expressed in its regulations, policies and decisions applying those regulations and policies. *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971). Section 271.4(a) is established as law barring subsequent amendment because the time period for bringing a petition for judicial review of the regulation has long passed, and by statute the regulation may not otherwise be attacked. *See* 42 U.S.C. § 6976(a)(1); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring).

must either be "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority." CERCLA § 104(c)(9)(B), 42 U.S.C. § 9604(c)(9)(B). Thus, not only does the statute specify that the state must distinguish in-state generators from those out-of-state, it requires that the state specifically account for in-state generated waste in connection with its in-state treatment and disposal facilities. Whether the state allocates all in-state capacity to in-state waste, all to out-of-state waste, or something in between, the statute requires that an allocation be made for the state's assurance of capacity to have any real meaning and practical effect. There simply is no way for a state without affecting interstate commerce to comply with Section 104(c)(9)'s requirement to ensure capacity for in-state waste, short of making infinite capacity available, which is not what Congress contemplated.

EPA has recognized the relevance of CERCLA § 104(c)(9) to the "consistency" standard of 40 C.F.R. § 271.4(a) by tying its implementation of CERCLA's capacity assurance requirement to its RCRA regulatory regime. In December 1988, then-EPA Administrator Lee Thomas directed that EPA's "CERCLA capacity assurance process should be used as an initial response to State actions which prohibit waste management within State boundaries without environmental justification." Memorandum from Lee M. Thomas to Regional Administrators (Dec. 23, 1988). Notwithstanding the fact that "the procedures for withdrawal of authorized State RCRA programs" could provide a remedy for such "unreasonable restrictions on interstate waste movements," the Administrator directed that withdrawal procedures should be considered only "after determining that the CERCLA process has proved ineffective." *Id.*

The long-standing constitutional principles governing this case were summarized in *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946). In *Prudential Ins. Co.*, the

challengers, like the court of appeals here, sought to relegate pertinent federal statutes entirely "to one side, either as not intended to have effect toward validating this sort of [state law] or, if construed otherwise, as constitutionally ineffective to do so." *Id.* at 422. Those questions cannot be so dismissed; they have primacy and are of "controlling" significance. *Id.* Because of the importance of those issues to the States and the administration of the nation's hazardous waste laws, the petition should be granted.

CONCLUSION

For the reasons set forth above, and those set forth in the Petition for Certiorari, the requested petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

RCRA Section 3006(b), 42 U.S.C. § 6926(b):

§ 6926. Authorized State hazardous waste programs

* * * *

(b) Authorization of State program

Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1)[13] of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter.

In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

RCRA Section 3009, 42 U.S.C. § 6929:

§ 6929. Retention of State authority

Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

40 C.F.R. § 271.4:

§ 271.4 Consistency.

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase "State programs applicable in other States" refers only to those State hazardous waste programs which have received final authorization under this part.

(a) Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.

(c) If the State manifest system does not meet the requirements of this part, the State program shall be deemed inconsistent.

Federal Register—Vol. 50, No. 217

Friday, November 8, 1985

Rules and Regulations

[46437]

40 CFR Part 271

[OSW-FRL-2921-6]

South Carolina; Decision on Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of Final Determination on South Carolina's Application for Final Authorization.

SUMMARY: South Carolina has applied for Final Authorization under the Resource Conservation and Recovery Act (RCRA). EPA has reviewed South Carolina's application and has reached a final determination that South Carolina's Hazardous Waste Program satisfies all of the requirements necessary for Final Authorization. Thus, EPA is granting Final Authorization to the State to operate its program in lieu of the Federal program.

EFFECTIVE DATE: Final Authorization for South Carolina, for purposes of judicial review, shall be effective at 1:00 p.m. Eastern time on November 22, 1985. However, in accordance with § 271.20(e), this Notice constitutes the Agency's official decision to approve South Carolina for Final Authorization.

FOR FURTHER INFORMATION CONTACT: Otis Johnson Jr., Chief, Waste Planning Section, Residuals Management Branch, Waste Management Division, U.S.

Environmental Protection Agency, 345 Courtland Street N.E., Atlanta, Georgia 30365, (404) 257-3016.

SUPPLEMENTARY INFORMATION:

I. Background

Section 3006 of the Resource Conservation and Recovery Act (RCRA) allows the Environmental Protection Agency (EPA) to authorize State hazardous waste management programs to operate in the State in lieu of the Federal program. To qualify for Final Authorization, a State's program must: (1) Be "equivalent" to the Federal program, (2) be consistent with the Federal program and other State programs, and (3) provide for adequate enforcement (Section 3006(b) of RCRA, 42 U.S.C. 6226(b) [sic]). On July 23, 1984, South Carolina submitted a complete application to obtain Final Authorization to administer a RCRA program. On October 25, 1984, EPA published a tentative decision announcing its intent to grant South Carolina Final Authorization. Further background on the tentative decision appears at 49 FR 42959, October 25, 1984.

In the October 25 notice announcing the Agency's tentative determination, EPA announced the availability of the State's application for public review and comment and the date of a public hearing on the application. The public hearing was not held, since neither EPA nor the South Carolina Department of Health and Environmental Control received a significant show of interest in holding the hearing.

On March 5, 1985, the decision to grant final authorization to South Carolina was temporarily postponed. At that time, EPA decided to defer a final decision until July 1985 to allow the State a reasonable period of time to resolve identified issues.

Prior to EPA's review of the State's performance in July 1985, the South Carolina Hazardous Waste Man-

agement Act (1935 Act No. 436) was amended to establish increased fees for disposal of hazardous waste. The amendments passed in June 1985 changed section 44-56-170 to raise the fee for land disposal of wastes generated within the State from $5.00 to $13.00 per ton. For land disposal of wastes generated outside the State, the fee was raised from $7.50 per ton to either $18.00 per ton or to the amount that would be charged for land disposal by the State in which the wastes were generated, whichever is higher.

[46438] EPA determined that this statutory change constituted a substantial program revision, and in accordance with 40 CFR 271.20(b), the Agency decided to solicit public comment. On September 13, 1985 (50 FR 37385), EPA published a second notice of tentative determination to approve the State. In that notice, EPA highlighted the question of whether the South Carolina Hazardous Waste Management Act Amendments rendered the State program inconsistent with the Federal program or approved State programs under RCRA.

The question to be settled before EPA granted final authorization was whether the South Carolina fee schedule rendered the State program inconsistent with the Federal program and other State programs. Under § 271.4(a) a State treatment, storage or disposal at facilities authorized to operate under the Federal or an approved State program . . .". [sic]

In the notice of tentative determination, EPA stated that while higher fees for out-of-State wastes should not be encouraged, the Agency did not have any evidence to indicate that the new fees would unreasonably restrict, impede, or operate as a ban on the transportation of hazardous waste into the State. The only evidence before the Agency at that time were South Carolina's statements that the fee imposed constitutes a "relatively small percentage" of the actual cost of disposal and that, in the State's view, it would not unreasonably restrict or im-

pede the movement of hazardous waste (50 FR 37386, September 13, 1985). The Agency solicited comment on whether the State law unreasonably restricts, impedes or operates as a ban on the importation of hazardous waste, under the consistency requirements of 40 CFR 271.4(a). EPA received written comments and also held a public hearing in Columbia, South Carolina.

II. Basis for EPA's Decision to Grant Final Authorization

The Agency today is making a final determination that the South Carolina fee schedule does not impose an unreasonable impediment or restriction or operate as a ban on the free movement of hazardous waste under 40 CFR 271.4. The fee schedule is not inconsistent with the Federal program or approved State programs under this regulation or under RCRA. This section explains the reasons for the Agency's decision on this matter. Because this was the only outstanding issue, the Agency is now able to grant final authorization to the State.

A. EPA's regulation

EPA adopted the present regulation at 40 CFR 271.4(a) on May 19, 1980 (see 45 FR 33395, 33465-66, May 19, 1980). The regulation states that any aspect which "unreasonably restricts, impedes or operates as a ban" is deemed inconsistent.

In the preamble discussing § 271.4(a), EPA explained the regulation as follows. The Agency stated that any aspect of the program which operates as a ban on the interstate movement of hazardous waste is automatically inconsistent. The Agency noted that this position was supported by a court decision, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), which held unconstitutional a statute banning transportation of certain wastes into the State for disposal because it violated the commerce clause of the Constitution. (This discussion is consistent

with that in the preamble to the proposed regulation (44 FR 34259, June 14, 1979).)

EPA did not discuss what criteria it would apply in determining whether State programs unreasonably restrict or impede the free movement of hazardous waste. However, it is clear from the regulation that EPA intended "unreasonable restrictions or impediments" to render State programs inconsistent. The question of whether a State provision unreasonably restricts or impedes the free movement of hazardous waste did not arise in any final decision to grant RCRA final authorization until South Carolina's amended statute raised this issue.

B. The Agency's Tentative Decision on South Carolina Authorization

As noted above, EPA tentatively concluded that the South Carolina statute did not render the State program inconsistent under 40 CFR 271.4(a). In reaching this conclusion, the Agency considered all available facts. It appeared reasonably clear from the face of the statute that the fee schedule was not a ban and that it did not operate as a ban. The evidence before the Agency did not indicate that the fee schedule had significantly affected the flow of hazardous waste into the State. However, because the amended statute was a potentially significant change to the State program which might affect authorization under 40 CFR 271.4, the Agency solicited comment on whether the fee schedule unreasonably restricts or impedes the flow of hazardous waste into South Carolina.

C. Public Comment

Public comment, with one exception, supported EPA authorization of the State program. Several commenters did not address the question of the fee schedules but generally stated that South Carolina's RCRA program was supported by adequate legal authority and staffing and therefore deserved authorization. The only land disposal

facility in South Carolina known to the Agency to accept out-of-State hazardous waste and to pay the fees at issue also generally supported authorization, but did not address the question rasied [sic] by the fee schedule.

Several other commenters who favored authorization argued that the fee schedule was reasonable and justified. They provided a variety of rationales including that the higher fees were appropriate: (1) To discourage land disposal as it is environmentally the least desireable [sic] form of disposal, (2) to raise money that might be expended to address released [sic] from land disposal units, (3) to discourage land disposal and thereby conserve the State's limited land disposal resource, and (4) to supplement State funds for monitoring compliance at land disposal facilities accepting out-of-State wastes.

The State of South Carolina commented that the one land disposal facility in South Carolina which accepts out-of-State wastes charges $90.00 per ton for disposal. First, the State noted that the new fee differential of $5.00 per ton for out-of-State wastes represents but a small percentage of this charge. The State believed that this small amount would not discourage out-of-State generators from using the facility. Second, the State noted that during the period of July to September of 1984 there were 16,848 tons of out-of-State waste disposed at the facility. During the same period in 1985, when the new fee schedule was in place, there were 26,352 tons of out-of-State waste disposed. The State cited this increase as factual proof that the fee schedule has not had any adverse impact on the amount of waste imported into the State. The State reported that fees had been collected at both the $18.00 rate and at higher rates corresponding to the fees of the States from which the wastes were shipped. Third, the State noted that a fee differential, including rates equivalent to those charged in the shipping State, had existed for several years and that there has been a continuing increase in the volume of wastes imported into the State.

The Hazardous Waste Treatment Council was alone in opposing authorization for South Carolina. The Council did not dispute that the volume of imported waste had increased despite the higher fees. Rather, they believed [46439] that the fee schedule discriminates on its face against interstate commerce and therefore was an unconstitutional and unreasonable restriction on the free flow of waste. The Council argued that: (1) The disparity in fees rendered the program "inconsistent" under RCRA 3006(b) as it did not promote the essential uniformity among hazardous waste programs intended by Congress, (2) the disparity in favor of in-State wastes was unconstitutional and therefore was inconsistent under RCRA 3006(b) and an unreasonable restriction or impediment under § 271.4(a), and (3) discriminatory statutes will frustrate RCRA objectives for a national market for development of proper treatment and disposal practices.

The Council stated that in promulgating 40 CFR 271.4, EPA had adopted a constitutional test to determine what is an unreasonable restriction and impediment. Therefore, they argued that the unconstitutional statute violated § 271.4(a). They also argued that it would be too difficult to assess whether there is in fact a significant discrimination on a case-by-case basis.

EPA believes that these are the substantive comments relating to the fee schedule and the Agency's decision. These and other comments are addressed in this notice and in a separate comment and response document that is available from EPA Region IV (address listed at the front of this notice).

D. Application of § 271.4(a) to South Carolina's Fee Schedule

EPA carefully evaluated the above comments in determining whether the South Carolina fee schedule was an unreasonable restriction or impediment to the free movement of hazardous waste.

The Agency has determined that in applying § 271.4(a) to State laws and regulations, EPA should look to whether the State provision in fact has or is likely to have a significant adverse effect on the follow [sic] of hazardous waste into or out of the State. Thus, the unreasonableness of the restriction or impediment under § 271.4(a) should be measured by the impact of [sic] likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported.

The Agency believes that this test is a reasonable interpretation of its regulation and does not conflict with section 3006 of RCRA. Section 271.4(a) does not by its terms prohibit any restrictions or impediments, only those that are unreasonable. Reasonable restrictions or impediments can logically include those that do not significantly decrease the flow of hazardous waste. Therefore, EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable. Contrary to the statement by the Hazardous Waste Treatment Council, the preamble adopting this regulation did not state that EPA was relying on the Constitutional test for impermissible restraints on interstate commerce as the basis for finding restrictions or impediments unreasonable. The Agency is not required to adopt the Constitutional test for impediments or restrictions in interpreting its own regulations, and declines to do so here.

EPA also believes that its interpretation of the regulation accords with RCRA. RCRA section 2006 [sic] requires EPA to approve State programs unless it finds they are: (1) Not equivalent, (2) not consistent, or (3) lacking adequate enforcement authority. To be equivalent, States must adopt a set of basic statutes and regulations that are equivalent to EPA's. In addition, States may adopt requirements which are more stringent or different than

EPA's authority. More stringent requirements are expressly permitted by RCRA section 3009. These requirements may have some adverse effect on interstate commerce. Different requirements are permissible if they are not inconsistent with the Federal program and approved State programs. Authorized States have adopted many State requirements that are unlike the requirements of other States and which, in some cases, have an effect on the flow of wastes. The Agency does not believe that the mere existence of differences or disparities in treatment makes State programs inconsistent *per se*. Congress expected that States would not have identical programs and recognized the importance of allowing States to experiment with different requirements. Congress gave EPA the authority to interpret the term "consistent"; the Agency has interpreted the term in § 271.4 to prevent unreasonable restrictions or impediments in authorized programs. Nothing in RCRA section 3006(b) or any other section of RCRA requires the Agency to adopt the Constitutional test as the test for consistency or unreasonable restrictions or impediments.

The Agency does not believe that higher fees for out-of-State wastes or other discriminatory practices should be encouraged. EPA is concerned that such fees may discourage wastes from going to the most appropriate facility for treatment or disposal.

However, it appears that South Carolina's fees schedule does not have a significant adverse effect on the flow of hazardous waste into or out of the State. All available evidence supports this conclusion. The fact that the fee differential is small in most cases indicates that the out-of-State fee probably will not restrict a significant volume of waste. Moreover, the fact that the volume of out-of-State wastes increased significantly after the higher fees were imposed suggests that there is not a significant adverse impact on the flow of wastes. The fees clearly do not operate as a ban in this case. In addition, some fees

were collected at the higher rate based on the fees of other States. Finally, the volume of wastes imported into the State has increased over the years despite a fee differential which included fees based on those in the State of origin. Although it is unknown how much more waste might have entered South Carolina if there were no fee differential, there is no information to suggest that a significant volume might be affected. The Agency disagrees that this test (which looks to the facts of each case) is too difficult to apply.

Several comments related to the reasons for the State's adoption of the fee schedule and one addressed the concern that discriminatory practices would frustrate RCRA objectives for a national market for proper treatment and disposal practices. EPA acknowledges that the State offered several reasons for the fee differential. However, the Agency believes that the reasons for the adoption of the fee or any purportd benefits are not generally relevant to the question of reasonableness of the impediment or restriction. If a provision has little or no impact on the flow of wastes, EPA does not believe that the actual motives or benefits resulting from the provision should preclude authorization. EPA is also concerned that different provisions for in-State and out-of-State wastes may frustrate the best possible treatment and disposal of wastes. As noted above, RCRA intended that State programs be generally uniform for purposes of encouraging proper treatment and disposal and EPA has interpreted this consistency requirement to deny authorization where restrictions or impediments are unreasonable. It does not require EPA to deny authorization merely because in-State and out-of-State wastes are regulated somewhat differently by the State. In any event, there is no evidence that proper [46440] treatment or disposal is adversely affected by this statute; the volume of wastes into South Carolina has increased.

In applying this facts and circumstances test, EPA is aware that circumstances may change over time. The

Agency will therefore periodically reassess provisions which may unreasonably impede the flow of wastes, including this fee schedule of South Carolina. In addition, any provisions adopted by States seeking authorization and which impose or result in restrictions or impediments or result in restrictions or impediments on the flow of wastes will be subjected to careful scrutiny. If an authorized State adopts restrictions or impediments that may affect the flow of hazardous wastes, EPA may find that such changes are significant revisions to the State's program and provide public notice and comment under § 271.21 on their potential impacts on interstate transportation of wastes. If the restrictions or impediments are found to be unreasonable, they would be grounds for withdrawal of the authorized program under § 271.22.

For the reasons discussed above, EPA has concluded that South Carolina's fee schedule is not an unreasonable impediment or restriction on the flow of waste into the State and that authorization is not precluded by § 271.4 (a). Nevertheless, the Commissioner of the South Carolina Department of Health and Environmental Control has informed the Agency that he will recommend to the South Carolina Legislature that it repeal that aspect of the fee schedule which imposes higher fees based on rates charged by the State of origin. EPA supports this effort.

South Carolina is not authorized by the Federal government to operate the RCRA program on Indian lands and this authority will remain with EPA.

Final authorization is hereby granted to South Carolina to operate its hazardous waste management program in lieu of the Federal program subject to the limitation on its authority by the Hazardous and Solid Waste Amendments of 1984 (Pub.L. 98-616, November 8, 1984). South Carolina now has the responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out the other aspects of the RCRA program. South Carolina also has primary enforcement

authority, although EPA retains the right to conduct inspections and make information requests under section 3007 of RCRA and to take enforcement action under sections 3008, 3013, and 7003 of RCRA.

Prior to the Hazardous and Solid Waste Amendments (HSWA) amending RCRA, a State with final authorization administered its hazardous waste program entirely in lieu of EPA. EPA's regulations no longer applied in the authorized State, and EPA could not issue permits for any facilities the State was authorized to permit.

Now, however, under seciton [sic] 3006(g) of RCRA, 42 U.S.C. 6226(g), the new Federal requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time as they take effect in non-authorized States. EPA is directed to carry out those requirements and prohibitions, including the issuance of full or partial permits, in authorized States until the State is granted authorization to do so.

As a result of HSWA, there will be a dual State-Federal regulatory program in South Carolina. To the extent the authorized State program is unaffected by the HSWA, the State program will operate in lieu of the Federal program. EPA will administer and enforce the portions of the HSWA in South Carolina until the State receives authorization to do so. Among other things, this will entail the issuance of Federal RCRA permits for those areas in which the State is not yet authorized. Once the State is authorized to implement a HSWA requirement or prohibition, the State program in that area will operate in lieu of the Federal program. Until that time the State will assist EPA's implementation of the HSWA under a Cooperative Agreement.

Federal HSWA requirements that are more stringent than the State's program apply in South Carolina. Any State requirement that is more stringent than a Federal HSWA provision also remains in effect. (South Carolina

is not being authorized now for any requirement implementing the HSWA.)

EPA has published a Federal Register notice that explains in detail the HSWA and its effect on authorized States. Refer to 50 FR 2872-28755, July 15, 1985.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of South Carolina's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This rule, therefore, does not require a regulatory flexibility analysis.

List of Subjects in 40 CFR Part 271

Hazardous waste, Indian lands, Reporting and recordkeeping requirements, Waste treatment and disposal, Intergovernmental relations, Penalties, Confidential business information.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b), and EPA Delegation 8-7.

Dated: November 5, 1985.

Jack E. Ravan,

Regional Administrator.

[FR Doc. 85-26814 Filed 11-7-85; 8:45 am]

(b)

Supreme Court, U.S.
FILED
JUN 5 1991
OFFICE OF THE CLERK

No. 90-1718

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

AMICUS BRIEF IN SUPPORT OF ALABAMA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS BRIEF SUBMITTED BY THE STATE OF OHIO ON BEHALF OF THE STATES OF ARIZONA, ARKANSAS, INDIANA, KANSAS, NEVADA, TENNESSEE AND WASHINGTON

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ATTORNEY GENERAL OF OHIO

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STATEMENT OF INTEREST

Two of the great and pressing pollution problems facing the nation today are the need for the siting of hazardous waste disposal facilities and the need for effective waste management. Unfortunately, the Court of Appeals below has broadly and anachronistically expanded the holding in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in a manner which thwarts these goals in the face of our vastly increased knowledge about the dangers of hazardous waste gained in the last thirteen years.

At pp. 16-17 of Petitioner's Memorandum, Alabama has concisely set forth at least eight reasons why *City of Philadelphia* should not apply to hazardous waste cases. The *amici* particularly emphasize the similarities between hazardous waste and those items permissibly banned by states in the quarantine cases long ago decided by this Court. Further, hazardous waste poses dangers not acknowledged in *City of Philadelphia*, and the *amici* seek a declaration that the Congressional mandate in the Superfund Amendments and Reauthorization Act of 1986[1] (SARA) permits actions such as those authorized in Alabama's Holley Bill, *Ala. Acts 1986, No. 89-788*, for the purpose of addressing a hazardous waste problem common to all states. Finally, the *amici* states refer the Court to the number of significant pieces of legislation discussed by the district court which lead to the inescapable conclusion that *City of Philadelphia*, insofar as it has been applied by the lower courts, is no more than a legal relic decided by this Court at a time at which the financial and environmental burdens which have ultimately proved to result from the disposal of hazardous waste could not have been fully realized.

Because of the overbroad and outdated application of *City of Philadelphia*, which arguably obligates states to accept hazardous waste without any qualifications imposed on the source thereof, a recent survey of forty-seven states found

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[1] Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

that of eighty-one siting applications for commercial hazardous waste treatment and disposal facilities, only six are operating.[2] Not one operational hazardous waste landfill has been developed in the United States in the last ten years.[3] The Eleventh Circuit's misinterpretation of the clear intentions of the crafters of SARA will reaffirm this demonstrated tendency of states to succumb to political pressures opposing the siting of much-needed hazardous waste facilities.

Therefore, the concise reasons for calling for the Court's review are twofold. First, the *amici* states assert that hazardous waste, which is intrinsically dangerous to human life and the environment, is properly treated more like the quarantine items permissibly controlled by the states pursuant to earlier precedent of this Court, rather than deserving the Commerce Clause protection enjoyed by healthful, desirable goods such as apples and milk. Second, the Eleventh Circuit's interpretation of state authority over interstate hazardous waste movement under federal law thwarts, rather than furthers, the clearly expressed intentions of Congress and the United States Environmental Protection Agency in SARA.

SUMMARY OF ARGUMENT

This Court has never squarely addressed the issues attendant to the interstate transportation of hazardous waste. *City of Philadelphia* dealt exclusively with the interstate transportation of solid waste, an item inherently different from hazardous waste. The proper analysis for this discrete regulatory field of publicly-perceived "bads" is that contained in Chief Justice Rehnquist's dissent in *City of*

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[2] 18 Env't. Rep. (BNA) 1103 (Aug. 21, 1987) (citing survey of the New York Legislative Commission on Toxic Substances and Hazardous Wastes.)

[3] *Chemical Waste Management, Inc. v. Alabama Department of Revenue*, No. 90-1098-PH, Circuit Court of Montgomery County, Alabama (Feb. 28, 1991), p. 8, now on appeal to the Alabama Supreme Court, Case Nos. 190-1043 and 190-1044.

Philadelphia. Maine v. Taylor, 477 U.S. 131 (1986), a case engendered by that dissent, is the basis for proper decision in this case.

Even if this Court should determine that *City of Philadelphia* was properly expanded by the lower court to encompass the transportation and disposal of dangerous hazardous waste, the law deveioped in that case merits reconsideration. In light of our technological enlightenment and the regulatory changes which have occurred over the last thirteen years, the peculiar hazards associated with the hazardous waste industry must be both recognized as warranting the same considerations as the quarantine items permissibly banned in *Bowman v. Chicago & Northwestern R. Co.,* 125 U.S. 465 (1988), and clearly set apart from this Court's consideration of solid waste issues.

The objectives of the *amici* states can alternatively be accomplished by an examination of the decision of the court below interpreting Section 104(c)(9) of SARA.[4] Congress clearly intended to authorize state control over interstate movement of hazardous waste insofar as it would promote the siting of new and safer disposal sites. United States Environmental Protection Agency guidance documents and statements contained in the Federal Register clearly

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[4] Section 104(c)(9), 42 U.S.C. 9604(c)(9) provides:

> Effective 3 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which -
>
> (A) have adequate capacity for the destruction, treatment or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20 year period following the date of such contract or cooperative agreement and are to be disposed of, treated, or destroyed,

establish that the intent of the Reauthorization was to enlist the individual states as critical partners in the success of the capacity assurance initiative, and to sanction state action like that embodied in the Holley Bill.

ARGUMENT

BROAD APPLICATION OF THE *CITY OF PHILADELPHIA* DECISION HAS FOSTERED PUBLIC OPPOSITION TO THE SITING OF NECESSARY HAZARDOUS WASTE FACILITIES

The political impasse in the hazardous waste facility siting process highlights the "Not In My Backyard" (NIMBY) nature of the problem. When North Carolina passed a restrictive hazardous waste permitting law in June of 1987 which effectively precluded the siting of a facility in the south-central part of the state, it was predicted that South Carolina's reaction to the law would spark a "hazardous waste civil war."[5] As anticipated, that legislation was the proverbial "shot heard around the world."

Other states have since joined in the controversy. In February, 1988, the Mississippi Legislature, reacting to citizen group pressures, introduced a bill to require county

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[4] Footnote 4 cont'd.

> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
> (C) are acceptable to the President, and
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

42 U.S.C. 9604(c)(9).

[5] *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans,* Stone, Jonathan R., 15 Columbia Journal of Environmental Law 1 (1990) (quoting 19 Env't. Rep. (BNA) 173 (June 3, 1988)).

referendums to permit hazardous waste facility siting.[6] In December, 1988, the Utah Solid and Hazardous Waste Committee approved stringent state siting criteria for hazardous waste treatment, storage, and disposal, declaring "The [public] perception is Utah is going to be the dumping area of the country."[7] In addition, U.S. EPA has expressed concern over the siting rules adopted in at least six states.[8] Indeed, Alabama's Holley Bill is a reflection of the aversion expressed by states of being "up for grabs" by any state whose sole qualification for being entitled to use the Emelle facility was that it generated hazardous waste.

But, perhaps the best example of the depth of the hazardous waste civil war is the continuing dispute between North and South Carolina. Most recently, the entire South Carolina congressional delegation has urged U.S. EPA to cut off North Carolina's Superfund money under Section 104(c)(9) of SARA due to North Carolina's breach of a promise to site and build new hazardous waste treatment and disposal facilities of its own. Referring to their state's efforts to hinder its historical acceptance of 65% of North Carolina's hazardous waste exports, and citing the frustrations it had suffered in a recent adverse decision from the federal court which this Court is presented with the opportunity to correct, the South Carolina delegation wrote:

> "States like South Carolina which allow hazardous waste facilities to operate are being penalized because the U.S. Constitution prevents us from limiting out-of-state waste entering our borders."[9]

Thus, the South Carolina legislature has publicly declared

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[6] 18 Env't. Rep. (BNA) 2149 (Feb. 12, 1988).

[7] 19 Env't. Rep. (BNA) 1786 (Dec. 30, 1988).

[8] 18 Env't. Rep. (BNA) 2111 (Feb. 5, 1988).

[9] The Superfund Report (February 27, 1991), at p. 7.

the same sentiments as the *amici* states.

As a result of political pressures across the nation and the overbroad application of the Commerce Clause principles handed down in *City of Philadelphia* to the field of dangerous hazardous waste, states persist in their reluctance to authorize hazardous waste facilities. Included in these beneficiaries are states which are using *City of Philadelphia* as an excuse to send their hazardous waste to other states rather than responsibly siting their own facilities. Encouraged by overbroad applications of *City of Philadelphia*, these states will continue to irresponsibly dump huge amounts of hazardous waste on other states. To compound the problem, the United States Environmental Protection Agency (U.S. EPA) has proven its reluctance to use the heavy hammer of withholding Superfund monies under Section 104(c) of SARA, apparently recognizing the futility of such a counterproductive forfeiture.[10] As a result, states which have failed to meet their capacity assurance obligations have done so with impunity insofar as federal sanctions are concerned.

If the Eleventh Circuit Court's decision is left intact, states such as Ohio which have accepted their responsibility to dispose of, at a minimum, certain types of their own hazardous waste, are powerless to protect their valuable capacity or in any way control the influx of this dangerous and environmentally costly waste. The Circuit Court's undercutting of the capacity assurance "weapon" of waste import limitations, clearly intended to be available to the states in the legislative history of SARA and clearly contemplated in U.S. EPA interpretive guidance documents, leaves Alabama and the *amici* states defenseless.

Further, despite the tremendous national implications of its decision, the Eleventh Circuit inappropriately expanded the *City of Philadelphia* rationale to fill the void left by that opinion in the hazardous waste arena. The Court of Appeals simply failed to acknowledge the innate differences between

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[10] The Superfund Report (February 27, 1991) at p. 8.

solid waste and hazardous waste. Alternatively, if this Court determines that *City of Philadelphia* was properly applied by the lower court, the principles enunciated in that precedent are certainly of questionable application in the face of our greater knowledge regarding the gravity and permanence of the risks associated with the disposal of hazardous waste. Therefore, the *amici* states respectfully request that the Court grant the State of Alabama's Petition for Writ of Certiorari.

THE PRINCIPLES ESTABLISHED NEARLY THIRTEEN YEARS AGO CONCERNING SOLID WASTE TRANSPORTATION IN *CITY OF PHILADELPHIA* DO NOT APPLY TO THE UNIQUE CIRCUMSTANCES SURROUNDING THE TRANSPORTATION AND DISPOSAL OF INNATELY DANGEROUS HAZARDOUS WASTE.

As appropriately noted by Petitioners, this Court has never addressed a state's power to enact reasonable restrictions on the interstate movement of hazardous waste to protect public health and the integrity of its natural resources. With the exception of the vision evident in Chief Justice Rehnquist's dissent in *City of Philadelphia,* this Court has similarly never considered whether hazardous waste merits the same protections therein afforded to solid waste, or whether hazardous waste, as an item bearing striking resemblance to the permissible items of quarantine in other precedent of this Court, is even worthy of commerce clause protections.

In fact, in his dissent in *City of Philadelphia,* Chief Justice Rehnquist would have upheld New Jersey's ban under the quarantine cases:

> [S]tates can prohibit the importation of items 'which, on account of their existing condition, would bring in and spread disease, pestilence and death . . .'

City of Philadelphia, 427 U.S. at 632, (Rehnquist, J.,

dissenting).

These "quarantine laws" are not considered impermissible protectionist measures even though they are directed against out-of-state commerce.

As so aptly articulated by Petitioners, the crux of this case is whether toxic and hazardous chemical wastes which can, in the words of the district court below, "*blind, cripple* or *kill,*"[11] are to be treated more like articles that spread "disease, pestilence or death,"[12] or like ordinary and publicly desirable articles of commerce such as milk[13] and apples.[14] The response to this rhetorical question should be made obvious by this Court's consideration of this timely issue.

The weakness in the broad application of *City of Philadelphia* to hazardous waste issues stems from the fact that that case was presented in terms which applied solely to the question of interstate dealings in solid waste. Apparently anticipating that all interstate waste issues could not be so generically decided, Chief Justice Rehnquist's dissent in that case was quick to recognize the artificial distinction made by the majority in its rejection of the pertinence of the quarantine laws because they focused on *transportation* of undesirables into the state, and their imposition of a lesser degree of state control over the risks posed by the ultimate *disposal* of potentially dangerous items within the state. Specifically, Chief Justice Rehnquist noted:

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[11] 729 F. Supp 797, emphasis added.

[12] See, *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Asbell v. Kansas*, 209 U.S. 251 (1908).

[13] *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

[14] *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

> I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in ever increasing danger to the public's health and safety.

City of Philadelphia, 437 U.S. at 632-633 (Rehnquist, J., dissenting). Assuming *arguendo* that this dichotomy between transportation and ultimate disposal is valid for solid waste, it should not be applied to hazardous waste. Instead, the severe dangers inherent in hazardous waste disposal compel the rationale provided by the Court's precedent in the quarantine cases. In light of the apparent inconsistency evident in the majority opinion in *City of Philadelphia*, and considering the subsequent development of federal waste management legislation (see the district court's opinion for a list of statutes which demonstrates Congress' ever increasing recognition of the dangers inherent in the disposal of hazardous waste) since that decision, this Court should recognize that the knowledge and experiences gained in the last thirteen years merits an evaluation and definition of the Commerce Clause protections which may be afforded to hazardous waste under the federal Constitution. The hazardous waste industry of today is certainly quite different from the solid waste industry addressed in *City of Philadelphia*.

To aid in the Court's consideration, the *amici* states respectfully submit that *Maine v. Taylor*, 477 U.S. 131 (1986), a case engendered by Chief Justice Rehnquist's dissent in *City of Philadelphia*, is controlling in the discrete field of hazardous waste. In *Maine v. Taylor*, the State of Maine banned all importation of live baitfish for the stated purpose of insulating its domestic baitfish crop from the harms posed by the introduction of damaging parasites. Although the statute facially discriminated against the interstate transportation of live baitfish, this Court upheld the ban as a reasonable means of accomplishing a legitimate state goal.

In *Maine v. Taylor,* the Court recognized that the Commerce Clause does not prevent states from regulating substances where their risks are known. The Court explained this principle as follows:

> "Not all intentional barriers to interstate commerce are protectionist, however, and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community."

477 U.S. at 148, n. 19.

The Court, speaking through Justice Blackmun, also recognized the practical limitations of the Commerce Clause where *unknown* environmental risks are clearly at issue, stating as follows:

> ". . . Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. [T]he constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . "

477 U.S. at 148. Therefore, subsequent to *City of Philadelphia,* the Court has recognized that the states may also regulate substances where their risks are imperfectly understood.

The dangers of hazardous wastes consist of both known and imperfectly understood risks. Therefore, the rationale of *Maine v. Taylor* applies with great force to hazardous waste regulation. For that reason, the solid waste principles set forth in *City of Philadelphia* should not be applied to hazardous waste.

Despite the dangers of hazardous waste, including both known and imperfectly understood risks, the *amici* states

do not seek the extreme measure of totally banning hazardous waste importation. The *amici* states seek the dual goals of *limiting* the volume of waste which any facility is obligated to accept, and encouraging a more equitable national sharing of responsibility for hazardous waste management through regional cooperation and workable and enforceable siting criteria. These goals can be accomplished through a recognition of the peculiar hazards posed by intrinsically dangerous hazardous waste, and a clarification of the rule set forth in *City of Philadelphia* to allow environmentally responsible states to protect themselves from states which continue to ignore their fair share of the nation's hazardous waste burden.

EVEN IF THIS COURT WERE TO CONCLUDE THAT *CITY OF PHILADELPHIA* HAS BEEN PROPERLY APPLIED BY THE LOWER COURT, THE SUBSTANTIAL WEALTH OF KNOWLEDGE GAINED OVER THE LAST THIRTEEN YEARS REGARDING THE DANGERS AND COSTS ASSOCIATED WITH HAZARDOUS WASTE DISPOSAL MERITS A REEXAMINATION OF THAT DECISION.

Should this Court decide that *City of Philadelphia* has, in fact, been properly applied by the Circuit Court to the hazardous waste arena, the substantial increase in our knowledge about the dangers inherent in the transportation and disposal of hazardous waste merit reconsideration of the blanket protections afforded in that decision. With the benefit of nearly thirteen years of technological and statistical data about all facets of hazardous waste, it would be only logical to conclude that the modern waste industry is worthy of renewed consideration. Thus, this Court should grant the review necessary to make the parameters of the Commerce Clause reflective of our greater understanding of the gravity of hazardous waste issues.

THE HOLLEY BILL IS CONSISTENT WITH THE AUTHORIZATION CONFERRED BY CONGRESS UPON HAZARDOUS WASTE IMPORTING STATES

IN SECTION 104(c)(9) OF SARA TO RESTRICT USE OF THEIR FACILITIES AND THEREBY FORCE THE DEVELOPMENT OF NEW, SAFER HAZARDOUS WASTE FACILITIES

Alternatively, the objectives sought by the *amici* states can be accomplished by an examination of Section 104(c)(9) of SARA and a recognition that Congress clearly, though implicitly, has authorized state action like that embodied in the Holley Bill. In 1986, Congress recognized the need for regional cooperation in the field of hazardous waste management, and afforded each state the authority to ensure that every other state adequately planned for hazardous waste disposal capacity through the siting of newer and safer facilities.[15] Thus, in Section 104(c)(9), Congress intended that actions could be undertaken by individual states such as that evidenced in the Holley Bill. The right to restrict waste was designed as a valuable means of rewarding environmentally responsible states with the option of excluding waste from their hazardous waste facilities which was generated in a state choosing to ignore its federal capacity assurance obligations.

The validity of the Holley Bill is reinforced by the U.S. EPA's interpretation of SARA at numerous citations in the Federal Register.[16] Thus, Congress has authorized states with existing hazardous waste disposal capacity to restrict out-of-state access to those facilities, and has simultaneously removed Commerce Clause limitations that would have otherwise applied. It is this enlisting of the individual states

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[15] See, for example, H. Rep. 99-69, May 7, 1985 (H.R. 2005); H. Rep. No. 99-253(I), Aug. 1, 1985 H.R. 2817); H. Rep. No. 99-253 (II), Oct. 28, 1985) (H.R. 2817); H. Rep. No. 99-253(III), Oct. 31, 1985 (H.R. 2817); H. Rep No. 99-253 (IV), Oct. 31, 1985 (H.R. 2817); H. Rep. No. 99-253 (V), Nov. 12, 1985 (H.R. 2817); S. Rep. No. 99-11, Mar 18, 1985 (S. 51); S. Rep. No. 99-73, May 23, 1985 (S.51); H. Conf. Rep No. 99-962, Oct. 3, 1986 H.R. 2005); H.Rep No. 99-255, Sept. 4, 1985 (H.R. 3065).

[16] 53 Fed. Reg. No, 169, at 33618 (August 31, 1988); 53 Fed. Reg. No. 250, at 92783 (December 29, 1988); U.S. EPA OSWER Dir. No. 9010.00.

as critical partners in the success of the capacity assurance process which demonstrates the legality and desirability of state legislation like the Holley Bill.

Therefore, there is only one interpretation of Section 104(c)(9) which fulfills the Congressional purpose so clearly enunciated in these historical and interpretive documents. The Circuit Court erred when it determined that Congress had not, in fact, intended to exercise its authority under the dormant Commerce Clause to permit exactly the kind of beneficial activities evidenced in the Holley Bill, as a means of promoting nationwide siting of these much-needed hazardous waste facilities.

CONCLUSION

For all of the foregoing reasons, the *amici* states respectfully request that this Court grant Petitioner's Writ of Certiorari to the Eleventh Circuit Court of Appeals.

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